Nos. 158, 159, 160, 161, 162, 163 & 164

IN THE

Supreme Court of the United States

October Term, 1955

FROZEN FOOD EXPRESS, *Appellant*,
v.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*.

INTERSTATE COMMERCE COMMISSION, *Appellant*,
v.
FROZEN FOOD EXPRESS, *et al.*, *Appellees*.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*, *Appellants*,
v.
FROZEN FOOD EXPRESS, *et al.*, *Appellees*.

FROZEN FOOD EXPRESS, *Appellant*,
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EAST TEXAS MOTOR FREIGHT LINES, INC. *et al.*, *Appellants*,
v.
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On Appeals From the United States District Court for the Southern District of Texas, Houston Division

BRIEF FOR EAST TEXAS MOTOR FREIGHT LINES, INC., ET AL.

Of Counsel:
MACLEAY, LYNCH and MACDONALD
Washington, D. C.
TODD & DILLON
Washington, D. C.
CALLAWAY, REED, KIDWELL and BROOKS
Dallas, Texas
REEDER, GISLER and GRIFFIN
Kansas City, Missouri

DAVID G. MACDONALD
FRANCIS W. McINERNY
504 Commonwealth Bldg.
Washington, D. C.
PETER T. BEARDSLEY
FRITZ R. KAHN
1424 Sixteenth St., N. W.
Washington, D. C.
CLARENCE D. TODD
DALE C. DILLON
944 Washington Bldg.
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PRELIMINARY STATEMENT

In noting probable jurisdiction in these proceedings this Court has recognized the interrelationship of the subject matter and the issues presented by assigning the several cases for consolidated presentation. Accordingly the appellant parties to this brief submit one document consisting of two parts, treating in Part A the matters and issues raised in cases numbered 158,

159, 160, and 161 and in Part B the matters and issues raised in cases numbered 162, 163 and 164.[1]

OPINION BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division (RA 104), is reported at 128 F. Supp. 374. The report of the Interstate Commerce Commission in Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities* (RA 30), is reported at 52 M.C.C. 511, and the Commission's report in Docket No. MC-C-1605, *East Texas Motor Freight Lines, Inc.*, v. *Frozen Food Express* (RB 38), is reported at 62 M.C.C. 646.

JURISDICTION

The final judgments of the District Court (RA 114 and RB 60) were entered on February 23, 1955, and notices of appeal (RA 123 and RB 68) were filed on April 22, 1955. Probable jurisdiction was noted by this Court on October 10, 1955. — U.S. —, 75 S.Ct. 63, 64. Jurisdiction to review the judgment on direct appeal is conferred upon this Court by Sections 1253 and 2101 (b) of the Judicial Code, 28 U.S.C. § 1253 & 2101 (b).

STATUTES INVOLVED

Involved are the National Transportation Policy, 49 U.S.C. preceding § 1; Sections 203(b)(6), 205(g), 206(a), 209(a) and 222(b) of the Interstate Commerce Act, 49 U.S.C. §§ 303(b)(6), 305(g), 306(a), 309(a) & 322(b); Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009; and Sections 1336, 1398, 2284 and

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[1] For convenience and clarity references to the transcript of record in cases 158 through 161 are prefixed (RA—) and in cases 162 through 164 are prefixed (RB—).

2321 to 2325, inclusive, of the Judicial Code, 28 U.S.C. §§ 1336, 1398, 2284 & 2321-2325, as set forth verbatim in Appendix A.

QUESTIONS PRESENTED

The following questions are presented by these appeals:

Nos. 158, 159, 160 & 161

Whether the United States District Court for the Southern District of Texas erred in its judgment (RA 114) rendered February 23, 1955, dismissing the complaints filed in Civil Action No. 8285, *Frozen Food Express, et al. v. United States, et al.*, for the reason set forth in the Court's opinion (RA 104) filed January 26, 1955, that the order of the Interstate Commerce Commission, dated April 13, 1951, in Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities*, (RA. 30), sought by the plaintiffs to be set aside and enjoined, is not an order subject to judicial review under Section 205(g) of the Interstate Commerce Act, 49 U.S.C.A. § 305(g), Section 10 of the Administrative Procedure Act, 5 U.S.C.A. § 1009, and Sections 1336, 1398, 2284 and 2321 to 2325, inclusive, of the Judicial Code, 28 U.S.C.A. §§ 1336, 1398, 2284 & 2321-2325, although the Commission in said proceeding classified certain processed agricultural commodities as being embraced within the exemption of Section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C.A. § 303(b)(6) and hence transportable by motor vehicles not subject to economic regulation by the Commission and classified other such processed agricultural commodities as being beyond the scope of the exemption of Section 203(b)(6) and thus able to be carried only in Commission-regulated motor vehicles?

Nos. 162, 163 & 164

Whether the United States District Court for the Southern District of Texas erred in its judgment (RB 60) rendered February 23, 1955, in Civil Action No. 8396; *Frozen Food Express, et al.* v. *United States, et al.*, insofar as it found that fresh and frozen dressed poultry were "agricultural (including horticultural) commodities (not including manufactured products thereof)" within the meaning of Section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C.A. § 303(b)(6), and hence transportable by motor vehicles not subject to economic regulation by the Commission?

Whether the court erred in its judgment in failing to sustain the finding of the Interstate Commerce Commission in its report and order (RB 38) in Docket No. MC-C-1605, *East Texas Motor Freight Lines, Inc., et al.* v. *Frozen Food Express* that fresh and frozen dressed poultry constitute "manufactured" products of agricultural commodities and hence are not embraced within the partial exemption of Section 203(b)(6)?

Whether the court erred in its judgment in setting aside, in part, the report and order of the Commission, adequately supported by findings of fact, in turn supported by substantial evidence and correct conclusions of law?

Whether the court erred in its judgment insofar as it enjoined and restrained the Commission from enforcing that part of its report and order that required respondent motor carrier to cease and desist from transporting fresh and frozen dressed poultry in interstate commerce for compensation except as authorized by the Commission?

PART A

STATEMENT OF CASE

Nos. 158, 159, 160 & 161

Section 203(b) of the Interstate Commerce Act, 49 U.S.C. §303(b), provides, in part, as follows:

> Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or *agricultural (including horticultural) commodities (not including manufactured products thereof)*, if such motor vehicles are not used in carrying any other property, or passengers, for compensation; . . . [Emphasis added.]

The task of administering and enforcing the provision of the Act is that of the Interstate Commerce Commission. Section 204(a)(6), 49 U.S.C. §304(a)(6); *McLean Trucking Co. v. U. S.*, 321 U.S. 67, 79, 64 S.Ct. 370, 377. For years the Commission determined item by item, as the question arose, what products were agricultural commodities within the terms of the exemption of section 203(b)(6).[1] and what prod-

[1] *Settle Common Carrier Application*, 46 M.C.C. 277 (eggs); *Severson Common Carrier Application*, 46 M.C.C. 6 (whole, skim and standardized milk and cream); *Newman Contract Carrier Application*, 44 M.C.C. 190 (apples); *Derr Contract Carrier Application*, 43 M.C.C. 437 (raw milk); *Dougherty Common Carrier Application*, 31 M.C.C. 793 (mushrooms); *Post Contract Carrier Application*, 13 M.C.C. 139 (potatoes); *Hubbs Common Carrier Application*, 6 M.C.C. 708 (peas); *Dimmick Common Carrier Application*, 6 M.C.C. 697 (peas); *Ramsey Contract Carrier Application*, 6 M.C.C. 647 (cream); *Phelps Common Carrier Appli-*

ucts were "manufactured" agricultural commodities and hence beyond the scope of Section 203(b)(6).[2]

The need for a comprehensive investigation of the meaning and scope of the partial exemption of Section 203(b)(6) having become apparent and the Secretary of Agriculture of the United States having peti-

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cation, 6 M.C.C. 629 (peas); *Akes Common Carrier Application*, 6 M.C.C. 543 (peas); *Harris & Callis Contract Carrier Application*, 4 M.C.C. 469 (peanuts); *Bowen Common Carrier Application*, 3 M.C.C. 655 (fresh fruits and vegetables); *Zambroski Common Carrier Application*, 3 M.C.C. 610 (fresh fruits and vegetables); *Le Compte Common Carrier Application*, 3 M.C.C. 241 (fresh corn, tomatoes and beans); *Williams Contract Carrier Application*, 2 M.C.C. 685 (fresh fruits and vegetables); *Clemence Contract Carrier Application*, 2 M.C.C. 292 (fresh melons and sweet potatoes); *Stone Contract Carrier Application*, 2 M.C.C. 259 (fresh fruits and vegetables); *Cavallaro Common Carrier Application*, 2 M.C.C. 65 (fresh fruits and vegetables); *Jancsofsky Common Carrier Application*, 1 M.C.C. 799 (grain); *Pohl Contract Carrier Application*, 1 M.C.C. 707 (milk and cream).

[2] *Harwood Contract Carrier Application*, 47 M.C.C. 597 (vegetable salads and washed spinach in cellophane bags); *Monark Egg Corporation Contract Carrier Application*, 44 M.C.C. 15 (shelled nuts and dressed poultry); *Newton Extension of Operations—Frozen Foods*, 43 M.C.C. 787 (frozen fruits and vegetables); *McCann Common Carrier Application*, 42 M.C.C. 61 (frozen fruits and vegetables); *McCarty Common Carrier Application*, 32 M.C.C. 615 (dressed poultry); *W. H. Tompkins Common Carrier Application*, 29 M.C.C. 359 (packing house products); *Allen Common Carrier Application*, 28 M.C.C. 26 (dressed poultry); *Lard and Vegetable Oil etc.*, 26 M.C.C. 135 (lard); *Hausman Extension—Morton, Ill.*, 20 M.C.C. 641 (meat and lard); *Battaglia Common Carrier Application*, 18 M.C.C. 167 (dressed poultry, butter and cheese); *Luckey Common Carrier Application*, 12 M.C.C. 739 (pasteurized milk); *Dugan Contract Carrier Application*, 7 M.C.C. 15 (clean rice, rice bean and rice polish); *Harris & Callis, supra* (ground peanut shells); *Pohl, supra*, (cream cheese and cottage cheese); *Juett Contract Carrier Application*, 1 M.C.C. 268 (oleomargarine).

tioned for a general investigation the Commission, by notice (RA 29) dated June 21, 1948, initiated on its own motion a proceeding, docketed as No. MC-C-968, *Determination of Exempted Agricultural Commodities*, to define the words "agricultural commodities (not including manufactured products thereof)" as they appeared in that section. After extensive hearings, covering 1,509 pages of testimony, the filing of exceptions to the examiner's proposed report and replies thereto and oral argument before the entire Commission, the Commission on April 13, 1951, issued its order (RA 101) discontinuing the proceeding.

The order expressly referred to and incorporated the concurrent report (RA 30) of the Commission containing its findings of fact and conclusions thereon. The Commission found, *inter alia*, that

> . . . the term "agricultural commodities (not including manufactured products thereof)" as used in section 203(b)(6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties or result in combinations. [52 M.C.C. 557.]

The Commission listed 14 commodities or groups of commodities in varying states of production which it deemed to be "agricultural commodities (not including manufactured products thereof)" as used in Section 203(b)(6). The list did not include, among other products, fresh or frozen meat, fresh or frozen dressed

poultry, feathers, shelled nuts and cotton seed hulls, the Commission, unlike the examiner, having concluded with respect to these commodities that for one reason or another they were not embraced within the partial exemption of Section 203(b)(6).

In the subject proceeding before the district court a motor common carrier sought to have the Commission's report and order in the *Determination* case enjoined, annulled and set aside insofar as it declared fresh or frozen meat, fresh or frozen dressed poultry, feathers, shelled nuts, and cotton seed hulls, among other products, not to be embraced within the partial exemption of Section 203(b)(6). By its order (RA 114) of February 23, 1955, the district court dismissed the complaint. The reason for dismissing the complaint as stated in the court's opinion (RA 104), dated January 26, 1955, was that "the report and order of the Interstate Commerce Commission of April 13, 1951, is not an 'order' subject to judicial review under any of the statutes cited."

The reviewability of the report and order of the Interstate Commerce Commission in the *Determination* case was questioned by none of the parties to the proceeding before the district court. The matter was introduced *sua sponte* by the court itself. As a matter of fact, when questioned by the court and subsequently on supplemental briefs, counsel for the several litigants, including the Interstate Commerce Commission, the Department of Justice and the Secretary of Agriculture of the United States, expressed the unanimous view that the report and order in the *Determination* case was such a final "order" as could be reviewed by the court.

The seemingly anomalous position of the Interstate Commerce Commission and intervenors in its behalf of appealing from a judgment that declined jurisdiction to disturb an order of the Commission results from the implications inherent in the district court's action. It leaves unsettled the question of what processed agricultural commodities are embraced within the partial exemption of Section 203(b)(6) of the Interstate Commerce Act and what commodities are beyond its scope. The district court in its opinion suggests (RA 109) that the complainant motor carriers should transport fresh and frozen meat, fresh and frozen dressed poultry, feathers, shelled nuts, and cotton seed hulls, among other products, without having therefor an I.C.C.-issued certificate of public convenience and necessity authorizing such transportation. The court says (RA 109) that the Commission likely will seek injunctive relief to restrain the transportation. At that time the legality of the Commission's determination of the exempt status of the affected commodities could be tried.

According to Commissioner John L. Rogers there were in the United States on February 1, 1950, approximately 40,000 haulers of agricultural commodities, farm supplies and fish operating in interstate commerce as compared to 20,042 Commission-regulated carriers of property. *Eastern Motor Express* v. *United States*, 103 F. Supp. 694, 702. It is conceivable that the Commission would be required to bring suit against each one of the agricultural haulers, or at least against as many of them as would be necessary to establish for each agricultural commodity in the various stages of production in which it may be transported by motor

carriers in interstate commerce whether the transportation is or is not subject to Commission regulation.

The resultant confusion and delay pending the litigation of countless suits can be avoided by a review of the Commission's decision in the *Determination* case wherein the meaning of the statutory language of Section 203(b)(6) was comprehensively interpreted and a long, detailed list of agricultural commodities, processed but not to the point of being manufactured, was published. The Commission's findings, if sustained by court review, will have the force and effect of law, will command universal obedience, and will put to rest the question of the scope of the partial exemption of Section 203(b)(6).

SUMMARY OF ARGUMENT

Nos. 158, 159, 160 & 161

The report and order of the Interstate Commerce Commission in the *Determination* case (RA 30) is a final order reviewable under Section 205(g) of the Interstate Commerce Act and the other stated references. It at last defined "agricultural commodities (not including manufactured products thereof)" and removed the partial exemption from certain agricultural products which had been "manufactured" within the meaning of Section 203(b)(6) of the Act. Its effect was to subject such carriers as did not comply with its findings and conclusions to the penalties prescribed by Section 204(e), and 222(a) and 222(b) of the Act. The appellants have a pecuniary interest in the order and are affected substantially by its provisions. Under this Court's decisions in the *El Dorado* and *Powell* cases, infra, as well as the *Noeding* decision, infra, it should have been reviewed by the district court.

The question presented by this appeal is important to the maintenance of a stable national transportation system by motor vehicles, efficient and adequate to meet the needs of commerce, the postal service and the national defense. National Transportation Policy, 49 U.S.C. preceding §1.

The decision of the district court has rendered the Commission's report and order in the *Determination* case impotent. Stripped of the vitality that court review of the decision would have imparted, the report and order stands barren, without purpose or meaning.

If sustained the district court's decision would require the status of each agricultural commodity as falling within or beyond the scope of the partial exemption of Section 203(b)(6) to be litigated before the courts, including this Court. Uncertainty would pervade this important segment of the transportation industry so long as law suits could be brought.

ARGUMENT

Nos. 158, 159, 160 & 161

POINT I

THE ACTION OF THE INTERSTATE COMMERCE COMMISSION IN DISPOSING OF THE ISSUES PRESENTED IN THE DETERMINATION CASE RESULTED IN AN ORDER SUBJECT TO JUDICIAL REVIEW.

The mere reading of the reasoning of the district court leading to the dismissal of the complaint discloses the error of law that was committed by the court. In support of its conclusion that the report and order of the Commission in the *Determination* case was not an "order" subject to judicial review the court said:

The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only "order" entered was one discontinuing the proceeding and removing it from the Commission's docket. The question is controlled by *U. S.* v. *Los Angeles R.R. Co.* (273 U.S. 284), holding a very similar "order" of the Interstate Commerce Commission which found, after an investigation, the value of certain railroad properties not to be subject to review. The language of Mr. Justice Brandeis, speaking for a unanimous Court there, aptly describes the order in issue here:

> "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected by the Commission, through its employees. It is the exercise solely of the function of investigation."

The situation presented by this appeal clearly is distinguished from that of the *Los Angeles* case. The Commission's report and order in the *Determination* case has been binding upon the motor-carrier industry. Following the decision many motor carriers undertook to transport commodities formerly considered as subject to regulation under the Interstate Commerce

Act. *Increases, Pacific Northwest*, 54 M.C.C. 125, 127. Conversely, many motor carriers that previously had engaged in the transportation of products found to be manufactured agricultural commodities in the *Determination* case either ceased transporting such products or filed applications with the Commission for certificates or permits authorizing such transportation. See *Cosgrove and Deimers Extension—Central States*, 53 M.C.C. 365.

Motor carriers who have continued to transport, without authority, products that the Commission found in its report and order in the *Determination* case to be manufactured agricultural commodities have violated Section 206 and Section 209 of the Act, respectively, 49 U.S.C. §§306 and 309. They have been ordered by the Commission, pursuant to Section 204(c) of the Act, 49 U.S.C. §304(c), to cease and desist from continuing such unlawful transportation. *Dart Transit Co.—Investigation of Operations*, 54 M.C.C. 429, sustained, *Dart Transit Co. v. Interstate Commerce Commission*, 110 F. Supp. 876, affirmed, *per curiam*, 345 U.S. 980, 73 S.Ct. 1138; *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 62 M.C.C. 648, sustained in part, *Frozen Food Express* v. *United States*, 128 F. Supp. 374. They have been sued by the Commission for injunctions to restrain their further violations of the Act, Section 222(b), 49 U.S.C. §322(b), *I.C.C.* v. *Allen E. Kroblin, Inc.*, 113 F. Supp. 599, affirmed 212 F. (2d) 555; *I.C.C.* v. *Wagner*, 112 F. Supp. 109; *I.C.C.* v. *Yeary Transfer Co.*, 104 F. Supp. 245, affirmed 202 F. (2d) 151, and they have been criminally prosecuted and convicted under Section 222(a) of the Act, 49 U.S.C. §322(a). *Southwestern Trading Co.* v. *U. S.*, 208 F. (2d) 708.

Furthermore, in passing upon applications for motor common carrier authority filed pursuant to Section 207 of the Act, 49 U.S.C. §307, or applications for motor contract carrier authority filed pursuant to Section 209, 49 U.S.C. §309, the Commission has given effect to its report and order in the *Determination* case. *Direct Transit Lines, Inc., Extension*, 62 M.C.C. 231; *Valleskey Common Carrier Application*, 62 M.C.C. 228, *Watkins Motor Lines, Inc. Ext.—Poultry*, 64 M.C.C. 167.

The report and order in the *Determination* case was more than a mere "press release." The findings embodied therein "must be taken by those entitled to rely upon them as to what they purport to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them." *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 422, 62 S.Ct. 1194, 1202. That they were embodied in an investigatory proceeding rather than a rule-making one is immaterial. "The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive" *Columbia Broadcasting System* v. *United States, supra*, at 316 U.S. 416, 62 S.Ct. 1200.

Nor is the effect of the Commission's order diminished by the fact that it was addressed to no specified carrier. It would be unrealistic to contend that because the Commission ordered no particular motor carrier to change its course of conduct, relief against what the Commission actually did is unavailable. This Court long has granted relief to parties claiming injury from

an alleged unlawful public action, although such action made no direct demands upon them. *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U.S. 123, 141, 71 S.Ct. 624, 633.

Section 205(g) of the Interstate Commerce Act assures any party in interest of the same right of relief from "any final order" under Part II of the Act, pertaining to motor carriers, as had been available under Part I, dealing with railroads and pipelines. The relief that had been available was for an interested party to maintain under Sections 1336 and 2323 of the Judicial Code, which were taken from the Urgent deficiency Appropriations Act of October 22, 1913, 38 Stat. 219 a civil action to "enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission". The right of judicial review thus conferred was strengthened by the enactment in 1946 of the Administrative Procedure Act, Section 10 of which provides, "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Directly in point are two decisions of the Supreme Court of the United States and a decision of the United States District Court for the District of New Jersey in which judicial review under the cited statutes or preceding legislation was had of orders of the Interstate Commerce Commission that suffered all or some of the technical deficiencies that the district court found in the subject proceeding to be fatal.

The Commission's report and order in *Allowances for Privately Owned Tank Cars*, 258 I.C.C. 371, was

not rendered in an adversary proceeding. The order which initiated the proceeding purported to do no more than direct that an investigation be made into the lawfulness of certain practices. When the final report and order was forthcoming some four years later, the only "order" was one discontinuing the proceeding and removing it from the Commission's docket.

Nevertheless the Supreme Court of the United States in *El Dorado Oil Works* v. *U. S.*, 328 U.S. 12, reversed the judgment of the district court dismissing the action for want of jurisdiction on the ground that the Commission's action did not amount to a reviewable "order." This Court said, at 328 U.S. 18:

> . . . the Commission's findings and determination if upheld constitute far more than an "abstract declaration." "Legal consequences" would follow which would finally fix a "right or obligation" on appellants' part. These findings are more than a mere "stage in an incomplete process of administrative adjudication", for the Commission has discontinued further proceedings . . . The district court erred in dismissing the complaint for want of jurisdiction.

Similarly in *Powell* v. *United States*, 300 U.S. 276, 284, 57 S.Ct. 470, 475, the contention was made that the antecedent Commission order in *Pollard, Receiver*, v. *Fort Benning R. Co.*, 206 I.C.C. 362, striking a certain tariff from the Commission's files, was not reviewable under the statute because it "is not directed to any party; it requires no one to do or to refrain from doing any act; it could not be enforced, obeyed or disobeyed; it did not speak to the future or contemplate any future effect because, on and after the date it was made, it had no significance 'except as a record of a certain completed act performed by the Commission.'"

The Supreme Court rejected the contention, saying at 300 U.S. 285, 57 S.Ct. 475:

> . . . overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect. . . . Interpreted according to its purpose, the order is in substance and effect an affirmative one and therefore reviewable under the statute . . . It is clear that the District Court of three judges had jurisdiction to entertain the Seaboard's suit."

Finally the proceeding in the subject case and in Commission Docket No. MC-C-2, *New York, N. Y., Commercial Zone*, 1 M.C.C. 665, are startlingly similar from the standpoint of the judicial reviewability of the Commission's final order. Both were instituted as investigations by the Commission into the scope of the partial exemption of Section 203(b) of the Interstate Commerce Act—pertaining to agricultural commodities within the meaning of subparagraph (6) in the former and to the New York Commercial Zone within the meaning of sub-paragraph (8) in the latter. Neither proceeding was an adversary one. In both cases notice was given only to the public; no carrier or carriers were named as respondents in the proceedings. In neither case was a carrier ordered to do or refrain from doing anything. In the light of these similarities the following discussion in *Charles Noeding Trucking Co.* v. *United States*, 29 F. Supp. 537, 543, reviewing the Commission's order in the latter case is particularly pertinent.

> . . . if the determination of exemption within the meaning of Section 203(b)(8) is purely an administrative function of the Commission this court is without jurisdiction of the pending cause. It would follow therefore, if this be correct, that

if the plaintiffs should refuse to comply with the regulations imposed by the Motor Carrier Act while operating in the territory covered by the Commission's order the Commission would then be required to make a further order upon the plaintiffs to require them to comply with the regulatory provisions of the Act. Section 222(a) of the Act, 49 U.S.C.A. §322(a), however, provides that a penalty may be imposed upon any motor carrier which shall knowingly and wilfully violate any provision of the Act or any rule, regulation or order promulgated thereunder.

The plaintiffs take the position that they are not required to incur penalties in order to test the validity of the exempt zone created by the Commission's order. They urge that the right to institute the pending suit is conferred upon them by the provisions of Section 205(h) of the Motor Carrier Act, 49 U.S.C.A. §305(h). This provides that "Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title." The right given to an interested party to review the orders of the Commission conferred by Section 208 of the Judicial Code (28 U.S.C.A. §46) is therefore carried over into the Motor Carrier Act. The word "final" however is used to qualify the phrase "Any * * * order" occurring in Section 205(h). We therefore must first determine whether or not the order here made by the Commission is in its nature a final order. If it is such it follows, we think, that it was made in a "proceeding" within the meaning of Section 205(f) of the Motor Carrier Act.

We conclude that the order sub judice is a final order for since it at last defines the exempt zones and purports to remove the qualified exemption from certain municipalities which are in fact contiguous within the meaning of Section 203(b)(8)

(for example Perth Amboy, Carteret, Linden and Elizabeth are physically contiguous to Richmond save only for the interposition of the Arthur Kill), its effect is to subject such carriers as do not comply with the regulations imposed by the Act to the penalties prescribed by the Act. The Commission's order therefore withdraws from the plaintiffs that partial immunity from regulation which they acquired by reason of the provisions of Section 203 (b)(8). As was stated by the Supreme Court in the case of *Powell* v. *United States*, 300 U.S. 276, 285, 57 S.Ct. 470, 475, 81 L.Ed. 643, "* * * overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect." It cannot be denied that the plaintiffs have a pecuniary interest in the order and are affected substantially by its provisions. We deem a final order to be one which ends the action or proceeding before the tribunal which makes it, leaving nothing further to be determined by that tribunal or required to be accomplished other than the administrative execution of the decision. A correct analogy to this phase of the case at bar is supplied by those cases which deal with the rate making powers of the Commission for other interstate carriers. See *United States* v. *Los Angeles & S.L.R. Co.*, 273 U.S. 299, 309, 47 S.Ct. 413, 71 L. Ed. 651; *Procter & Gamble Co.* v. *United States*, 255 U.S. 282, 293, 32, S.Ct. 761, 56 L. Ed. 1091; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 55 S.Ct. 462, 79 L. Ed. 4023.

In the case of *Rochester Telephone Corporation* v. *United States*, 59 S.Ct. 754, 758, 83 L. Ed. 1147, decided April 17, 1939, the Supreme Court, by Mr. Justice Frankfurter stated: "* * * where the Commission's order denies an exemption from the terms of the statute, as in the Intermountain Rate cases, 234 U.S. 476, 34 S.Ct. 986, 58 L.Ed. 1408, the road to the courts' jurisdiction seems to be clear. There is a constitutional 'case' or 'contro-

> versy,' *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047; the requirements of equity are satisfied if disregard of the Commission's adverse action entails threat of oppressive penalties; and the suit is within the express language of the Urgent Deficiencies Act, in that it is one 'to enjoin, set aside, annul' an 'order of said commission.' 28 U.S.C. Secs. 46, 47, 28 U.S.C.A. §§46, 47. While the penalties may be imposed by the statute for its violation and not for disobedience of the Commission's order, a favorable order would render the prohibitions of the statute inoperative." Nor is the jurisdiction conferred by the Urgent Deficiencies Act limited to suits by carriers to avoid statutory penalties. Such suits may be maintained by other parties in interest. See *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U.S. 382 [52 S.Ct. 440, 76 L.Ed. 808]; *Mississippi Valley Barge L. Co.* v. *United States*, 292 U.S. 282, 293 [54 S. Ct. 692, 78 L.Ed. 1260].

It is apparent, therefore, that the district court erred in declining to review the Commission's order in the *Determination* case. This court's decisions in the *El Dorado* and *Powell* cases, supra, as well as the *Noeding* decision, supra, furnish ample and reliable precedent sustaining the judicial review of such an order of the Interstate Commerce Commission.

POINT II

THE DECISION OF THE DISTRICT COURT CONFLICTS WITH THE DISPOSITION OF THE SAME ISSUE BY ANOTHER U. S. DISTRICT COURT.

The decision of the district court in the subject proceeding that the order of the Interstate Commerce Commission is not judicially reviewable presents a conflict with the decision of the United States District Court for the Southern District of Florida, in *Florida*

Gladiolus Growers Ass'n. v. *United States*, 106 F. Supp. 525. Sitting as a three-judge statutory court, the court reviewed the Commission's order in the *Determination* case and restrained the Commission from enforcing that portion of it which declared horticultural commodities not to be agricultural commodities within the scope of Section 203(b)(6).

An examination of the briefs indicates, as in the instant case, that no jurisdictional objection was raised by any of the parties. This circumstance, no doubt, detracts from the weight of this case as an authority on the procedural issue. On the other hand, the question whether an action presents a justiciable controversy is one that the courts may raise *sua sponte* in order that the judicial process may not be abused. *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125, 128, 59 S.Ct. 754, 756. Consequently the assumption of jurisdiction in the *Florida Gladiolus* case may be construed as constituting at least some indication that an action may be maintained under circumstances similar to those in the case at bar. It is possible, indeed, that the point did not occur to the court, since the matter was not brought to its attention by counsel. In any event, tacit or negative though it be, it is the latest expression of that court on this point. *Union Producing Company* v. *Federal Power Commission*, 127 F. Supp. 88, 93.

The confusion that results from these conflicting positions should be dispelled by the reversal of the judgment of the district court in the subject proceeding and the remanding of the matter to the district court for disposition on the merits.

PART B

STATEMENT OF CASE

Nos. 162, 163 & 164

On December 23, 1953, East Texas Motor Freight Lines, Gillette Motor Transport, Inc., and Jones Truck Lines, Inc., appellants herein, pursuant to the provisions of Section 204(c) of the Interstate Commerce Act, 49 U.S.C. 304(c), filed with the Interstate Commerce Commission their complaint alleging that Frozen Food Express, appellee herein, was engaged in the for-hire interstate transportation of fresh and frozen meats, meat products, and dressed poultry, to, from, and between points in the United States not authorized in its certificates of public convenience and necessity. The Commission was requested to issue an order requiring Frozen Food Express to cease and desist from the allegedly unlawful operations. On February 25, 1954, all parties to the complaint proceeding before the Commission submitted a stipulation of facts, accompanied by certain documentary evidence in exhibit form (RB 71). The stipulated facts and exhibits constituted the record both before the Commission and the District Court.

The ultimate issue before the Commission was whether the operations complained of came within the exemption provisions of section 203(b)(6) and could, as a result, be performed lawfully in the absence of a certificate of public convenience and necessity or permit from the Commission. By report, dated July 13, 1954 (RB 38, 45), the Commission found and concluded:

> "(1) that the exemption of vehicles used in carrying 'ordinary livestock' does not extend to fresh or frozen meats, the products of the slaugh-

ter of such livestock; (2) that the exemption of vehicles used in carrying 'agricultural (including horticultural) commodities (not including the manufactured products hereof)' does not embrace vehicles used in carrying ordinary livestock in view of the specific exemptions in the same section of vehicles used in carrying that commodity; and (3) that the exemption of vehicles used in carrying 'agricultural (including horticultural) commodities (not including manufactured products thereof)' does not in any event extend to vehicles used in carrying either fresh or frozen meat or fresh or frozen dressed poultry."

In accordance with its findings and conclusions, the Commission entered an order (RB 47) requiring the defendant, Frozen Food Express, to cease and desist from all motor carrier operations in interstate and foreign commerce found in the report of the Commission to be unlawful.

On August 2, 1954, appellee, Frozen Food Express, instituted an action in the court below in which it sought to have set aside and annulled in its entirety the order of the Commission (RB 1). In that suit no attack was made on the Commission's action with respect to the adequacy of the Commission's findings nor the sufficiency or substantiality of the evidence. The sole contention was that the Commission erred as a matter of law in its construction and application of the provisions of 203(b)(6). At the trial below, the Interstate Commerce Commission, together with appellants herein and other intervening defendants including certain railroads, defended the Commission's order; however, the statutory defendant, the Attorney General of the United States, refused to defend the action of the Commission and joined the intervening plaintiff, the Secretary of Agriculture, in

the latter's contention that the provisions of the statute in question should have been construed by the Commission so as to exempt from the certificate requirements of the Act motor vehicles engaged in the transportation of fresh and frozen meat and fresh and frozen poultry.

The lower court agreed with the Interstate Commerce Commission in the latter's holding that motor vehicles engaged in interstate for-hire transportation of fresh and frozen meat and meat products were not within the exemptive language, but on the strength of *I. C. C.* v. *Allen E. Kroblin, Inc.*, 133 F. Supp. 599, affirmed 212 F. 2d 555, refused to accept the Commission's determination with respect to fresh and frozen dressed poultry and accordingly set aside that part of the Commission's order restraining the plaintiff from transporting dressed poultry in the absence of authority from the Commission.

SUMMARY OF ARGUMENT

Nos. 162, 163 & 164

As seen from the foregoing statement the question presented, stripped of collateral issues and reduced to its briefest expression, is whether dressed poultry (fresh or frozen) is an *agricultural commodity* and not a *manufactured product thereof* as those terms are used in section 203(b)(6) of the Act. These appellants contend that poultry of the type described is a manufactured product and no longer an agricultural commodity and accordingly not embraced within the exemptive language of the statute.

Appellants, like all others that have encountered the question, concede that the statutory language involved is difficult to apply not only because the lan-

guage employed by Congress is ambiguous but also because its legislative history, the conventional extrinsic aid to statutory construction, leaves much to be desired with respect to determining the intent of Congress particularly on some commodities, including processed poultry. Notwithstanding its limitations, appellants contend that the legislative history of the section in question when viewed in the light of the purpose sought to be achieved by Congress in enacting the entire statute supports the construction which they urge.

Additionally, and more importantly, these appellants in support of the interpretation of the statutory terms which they urge rely on four basic propositions.

First, appellants contend that since meat packing—the processing of fresh and frozen meat—and poultry killing, dressing, and packing—the processing of fresh and frozen dressed poultry—were classified and considered by governmental agencies and by trade and industry—and necessarily therefore by Congress—as manufacturing processes, and the products thereof manufactured, Congress did not intend to include such commodities within the partial exemption of Section 203(b)(6). *Second*, appellants contend that there has been a continuous, uniform, and settled interpretation and administration of the provisions in question and that such administration and interpretation has been universally and consistently accepted by those members of the public most directly concerned. *Third*, appellants contend that as a matter of fact, based on industry practices and methods, the processing required to prepare for market fresh and frozen meat and fresh and frozen dressed poultry are processes of *manufacture* as that term is used in the statute and

as it has been defined by the Commission in the *Determination Case* and by Congress in the Renegotiation Acts. [1] *Fourth*, it is contended that the Commission's action in the proceeding below is based on an interpretation of the exemptive language completely consistent with (a) the National Transportation Policy, the general purposes of Part II of the Interstate Commerce Act; and (b) is supported by adequate findings which in turn are based on substantial evidence. Appellants also contend that the *Kroblin case*, infra, was erroneously decided and accordingly should be rejected by this court.

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[1] The Commission's definition or description of the term "agricultural commodities" is substantially in accord with the definition of that term used by Congress itself in the Renegotiation Acts of 1942, 1948, and 1951, as amended. Title 50, U. S. Code Annotated (Appendix Section 1191 (i)-(1)-(e).) The exemption provisions of the Renegotiation Acts excluded from the application of its provisions contracts involving the acquisition of agricultural commodities. The Renegotiation Act, however, unlike the Motor Carrier Act, defines with particularity the term "agricultural commodities." The language of the exemption is as follows:

> "1216. Exemptions—(a) Mandatory exemptions
> The provisions of this title (sections 1211-1223 of this Appendix) shall not apply to—
>
> (1) any contract by a Department with any Territory, possession, or State, or any agency or political subdivision thereof, or with any foreign government or any agency thereof; or
>
> (2) any contract or subcontract for an agricultural commodity in its raw or natural state, or if the commodity is not customarily sold or has not an established market in its raw or natural state, in the first form or state, beyond the raw or natural state, in which it is customarily sold or in which it has an established market. The term "agricultural commodity" as used herein shall include but shall not be limited to—
>
> (A) commodities resulting from the cultivation of the soil

ARGUMENT

Nos. 162, 163 & 164

POINT I

THE LEGISLATIVE HISTORY OF SECTION 203(b)(6) INDICATES THAT THE CONGRESS INTENDED TO INCLUDE WITHIN THE CERTIFICATE PROVISIONS AND ECONOMIC REGULATORY PROVISIONS OF PART II OF THE INTERSTATE COMMERCE ACT SUCH COMMODITIES AS FRESH AND FROZEN POULTRY.

Congress in 1935 enacted legislation to regulate the transportation of property and passengers in interstate commerce by motor vehicle. This after earlier legislatures had considered proposed legislation but failed to act apparently because of the complexity of the scheme of regulation proposed. The statute as enacted was the subject of extended legislative hearings and debates. In Appendix B to this brief, the legislative history relating to those terms of the statute here in question is set forth, together with a brief summary of amendments or amendment attempts made subsequent to the enactment of the statute.

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such as grains of all kinds, fruits, nuts, vegetables, hay, straw, cotton, tobacco, sugarcane, and sugar beets;

(B) natural resins, saps, and gums of trees;

(C) animals, such as cattle, hogs, poultry, and sheep, fish and other marine life, and the produce of live animals, such as wool, eggs, milk and cream; . . . ".

As seen, the language employed by the Congress in describing and defining the limits of the exemption in the Renegotiation Acts spells out in detail the legislative intent. Sub-section (2), for example, specifies that the exemption extends to contracts for agricultural commodities in their "raw or natural state" except where the commodity is one not customarily sold in its raw or natural state—the latter class of commodities are exempt only to the "first form or state" beyond the raw or natural state in which it is customarily sold.

If one thing, more than any other, stands out with respect to the intent of Congress in enacting the partial exemption of Section 203(b)(6), as well as the exemptions of Section 203(b) (4a) and Section 203 (b)(9), it is that the farmer was to be relieved of most of the burdens of motor carrier regulation. Throughout the hearings before the Senate and House committees and the debates on the floors of both houses of Congress the talk was of aiding the farmer, exempting from impending regulations his truck engaged in the occasional or reciprocal transportation for hire of his neighbor's goods, the truck of his cooperative, and the truck taking the fruits of his labors to market. To broaden the scope of the partial exemption of Section 203(b)(6) so as to allow commercial fleets of refrigerated trucks to travel thousands of miles in the for-hire carriage of manufactured agricultural commodities such as fresh and frozen dressed poultry, free from virtually any economic control would be to do violence to that Congressional intent.

The record evidence establishes (RB 85, 86) that generally the processing, marketing and interstate transportation of fresh and frozen poultry is done by, or for the account of, large meat packing companies. Therefore, whatever benefits are to be derived from the exempt motor carrier movement of poultry would accrue not to the farmer as so clearly intended by Congress but rather to those in a non-agricultural or industrial pursuit.

POINT II

THE CLASSIFICATION OF THE INVOLVED FOOD PRODUCTS BY THE EXECUTIVE DEPARTMENTS AND OTHER FEDERAL AGENCIES AS "MANUFACTURED" ARTICLES REQUIRES THAT THEY BE SO CONSIDERED UNDER SECTION 203(b)(6) OF THE INTERSTATE COMMERCE ACT.[1]

Since prior to 1935 the meat packing industry and the poultry killing or processing industry have been classified as manufacturing industries; and meats, meat products, and dressed poultry have been classified as manufactured foods in all of the numerous classifications issued by the executive departments and agencies of the government pursuant to acts of Congress. Knowledge of these consistent regulatory interpretations, policies and practices necessarily must be imputed to Congress.

Exhibits 5 through 19 (RB 88-146) show that over a long period of time beginning well before the enactment of Part II of the Interstate Commerce Act in 1935 and continuing without interruption to this date various Executive departments and agencies of the U. S. Government including the Department of La-

[1] In the litigation below, both before the Commission and the District Court, plaintiffs contended that both products of poultry slaughter and products of livestock slaughter were embraced in the exemptiv language of the statute. Although the three judge District Court held (one judge dissenting) that products of livestock slaughter were not within the terms of the statute and, although no appeal from that part of the District Court's decision is pending in this Court, appellants believe it desirable to include argument with respect to both poultry and meat. This for the reasons that the record before the Commission contains evidence relating to both commodities and both the Department of Agriculture and the Department of Justice urged the District Court to hold that products of livestock slaughter are within the terms of the exemption.

bor (Bureau of Labor Statistics) (U. S. Unemployment Service), the National Recovery Administration, the Department of Commerce, (Bureau of Foreign and Domestic Commerce) (Bureau of Census), the Executive Office of the President (Bureau of the Budget), the War Production Board, the Department of the Treasury (Procurement Division), the Social Security Board (Bureau of Research and Statistics), pursuant to direction by Congress or under the authority of Congress, established systematic and standardized classifications of commodities by economic groups and grouped in classification codes the various industries. An examination of the exhibits reveals that the classifications, whether by commodity or industry, in each case reflect the fact that throughout the classifications the same general terminology has been used and that *dead, edible animals and birds and products thereof have been classified as manufactured agricultural articles;* that the Executive departments' classifications establish that *dressed poultry is a meat product* and therefore a "manufactured" article. Meats and meat products generally throughout the various Executive departments' classifications are termed *manufactured foodstuffs* and that meat packers are classified as *manufacturers.* Poultry, dead, dressed, or undressed, fresh and frozen, prepared or preserved, has been consistently considered as a *manufactured product.*

Exhibits 5 through 19, (RB 88-146) from which the stipulations of fact numbered 16 through 30 (RB 74-81) have been drawn, indicate clearly that the terminology employed throughout has been used consistently and without material change since before 1935. Moreover, the terminology used represents the gen-

erally accepted and prevailing principle that the dead, edible products of farm animals and birds are *manufactured agricultural* products.

Exhibits 5, 6, 7, 8, and 9, (RB 88, 92, 95, 97, 101) as may be seen from the title pages thereof, are all governmental publications not only available to members of Congress but also available to the technical staffs of Congressional committees preparing legislation. Intervenors consider the information contained in the last-named exhibits with respect to the classification of the questioned food products of such importance in determining Congressional intent that it here merits brief restatement.

In the Bureau of Labor Statistics publication entitled "Wholesale Prices of Commodities", January 1929 (Exhibit No. 5, (RB 88)) the Department of Labor classified cattle, hogs, sheep, and poultry in the live state as "farm products." Fresh meats, however, including beef, lamb, mutton, pork, veal, and "*poultry, dressed*" were included under the classification "foods." (RB 91)

In a publication entitled "Code for Industrial Classification," issued in 1933 by the Bureau of Economic Research and Planning, National Recovery Administration (Exhibit No. 6 (RB 92)), there is set forth a systematic classification by commodities of business and industry. Division A of that classification groups agriculture, forestry, and animal husbandry together. Sub-classifications under agriculture include stock farming—cattle, hogs, horses, sheep, etc., bee culture (apiaries) and poultry. Classified under Division H, which groups manufacturing industries, meat packing is defined as follows:

"This classification covers establishments engaged in both slaughtering cattle, hogs, sheep, or other animals and preserving all or a part of the raw stock by canning, salting, smoking, or otherwise curing it for the trade; establishments which purchase raw stock from slaughter houses and preserve it (includes lard)."

A more specific grouping under Division II, Section I, entitled "Food and Kindred Products," includes a classification entitled "all other food products," which in turn includes "poultry killing, dressing, and packing, wholesale." "Peanuts, walnuts and other nuts, processed or shelled" are also included in this classification.

Schedule A—"Statistical Classification of Imports into the U. S.", a systematic classification of commodities used in administering the tariff laws, published in the year 1932 by the Department of Commerce (Exhibit 7, RB 95) contains a major grouping entitled "animal and animal products, edible." Subgrouped thereunder are two classifications entitled "(A) animals, edible, except for breeding; and (B) meat products." Under the first of those classifications is included *poultry in the live state.* Included under the second classification "Meat Products" was the sub-classification "Birds, including *poultry—dead, dressed, or undressed.*" Included also under the second classification is "Fresh, chilled, or frozen beef, veal, pork, lamb, goat meat, reindeer meat and venison."

In a publication entitled "Industry Classifications for the Census of Manufacturers, 1933," issued by the Bureau of the Census, Department of Commerce, in 1934 (Exhibit 8 RB 97) there is contained a sta-

tistical classification of industries. "Meat Packing, Wholesale" and "Poultry Killing, Dressing, and Packing, Wholesale" are included within "Industry Group 1.—Food and Kindred products" as *manufacturing industries.*

The Bureau of the Census, U. S. Department of Commerce, in its publication "Foreign Commerce and Navigation of the United States," published in 1934 (Exhibit 9-RB 101) classified live meat animals under the generic description "Animals, edible." Beef, veal, pork, mutton, lamb, and other fresh meats, dead turkeys and other dead poultry, and prepared poultry, however, were included within the classification "Meats." Under table 15, which groups articles in accordance with their degree of manufacture, those coming within the term "Meats" are classified as dutiable under "Class C—Manufactured Foodstuffs."

The classifications of commodities and industries as made by the Executive departments at the time that the Motor Carrier Act was under consideration by the Congress, particularly since such classifications were made under Congressional mandate, is the most convincing evidence of Congressional intent with respect to the question of what commodities were intended to be included within the provisions of Section 203(b)(6). That such classification data should be used by the Court as a persuasive guide in this proceeding is beyond question for in the *Determination Case* even the Secretary of Agriculture on brief urged the Commission to consider the Standard Industrial Classification Manual (published subsequent to the enactment of Part II of the Act) in resolving the issues then before the Commission.

Since the described classifications constitute a clear, uniform construction employed by all governmental

agencies in carrying out Congressional mandates involving practically all phases of governmental regulations of business, it is a logical and necessary conclusion that Congress adopted the same meaning for the words "manufactured products" in Section 203 (b)(6) of the Motor Carrier Act.

POINT III

MEATS, FRESH AND FROZEN, AND OTHER PRODUCTS OF SLAUGHTER; AND POULTRY, FRESH AND FROZEN, HAVE BEEN CONSISTENTLY HELD TO BE SUBJECT TO THE CERTIFICATE PROVISIONS OF PART II OF THE ACT AND THE COMMISSION'S INTERPRETATION HAS HAD UNIVERSAL AND CONSISTENT ACCEPTANCE BY THOSE MEMBERS OF THE PUBLIC MOST DIRECTLY CONCERNED.

The reports of the Interstate Commerce Commission fail to disclose any case in which it was contended that products of animal slaughter should be classified as unmanufactured agricultural commodities. To the contrary, reports of the Commission indicate quite conclusively that since the beginning of Federal regulation of motor transport, products of slaughter have been considered manufactured, and consequently not within the purview of the partial exemption of Section 203 (b)(6) of the Act. In the *Determination Case*, the Interstate Commerce Commission did give brief consideration to the question of whether or not products of slaughter were so-called exempt commodities and expressly held that "fresh meat and meat products" did not fall within the description "agricultural commodities." The Commission's decision in that case also excluded pelts, skins, and green and salted hides from the exempt category. Generally, however, the Commission did include as exempt commodities under Section 203(b)(6) all products of *live* animals such as wool and mohair, milk, eggs (in the shell), and honey. From the report of the Commission it

appears that none of the numerous parties in the *Determination Case*, including the Secretary of Agriculture, even suggested that meat in the form of fresh or frozen beef; fresh or frozen pork, or fresh or frozen lamb should be considered as commodities within the exemption provisions of Section 203(b)(6). The fact that no representations with respect to meats and meat products were made is evidence of the acceptance by those affected by the Commission's uniform holdings that fresh and frozen meats, as well as other meat products, were not within the term "agricultural commodities." It is appropriate to note here that in the *Determination Case*, the Department of Agriculture, although urging that the meat of poultry be classified in the exempt category, did not contend that any products of slaughter (save hides) should be considered as unmanufactured agricultural commodities. It was contended that the washing, grading, drying, storing, salting and packaging of animal hides did not make that commodity a manufactured product and that hides therefore should be considered as and classified by the Commission as an exempt commodity. But, as hereinbefore stated, the Commission rejected the Department of Agriculture's position on animal hides and held both green and salted hides not to be within the meaning of "agricultural commodities" as that term is used in the Act. The Commission's holding with respect to the classification of hides has been followed by the United States Court of Appeals for the Fifth Circuit in *Southwestern Trading Company v. U. S.*, 208 F. 2d 708. Judge Holmes speaking for the Court stated:

> "In a proceeding before the Interstate Commerce Commission, reported in 52 Motor Carrier Cases 511, the history of the legislation was re-

viewed, and it was found that the primary purpose of the partial exemption provided in said Section 303 (b) (6) was to aid the farmer in agricultural pursuits; that the words agricultural commodities, should be construed in their plain, usual, and commonly accepted sense. The Commission proceeded to group agricultural commodities under three general headings: those which are produced by plants; those which are produced continually by living animals kept on the farm, such as milk, eggs, and wool; and live poultry. The only group into which cow hides could possibly come would be the products of animals, but it is apparent that cow hides would not be included within this group, as said classification refers only to the commodities which living animals produce continually and with regularity. The hide is a part of the animal; separable only upon its death; it is a product of slaughter only. The Commission specifically found that slaughtered animals were not embraced in the definition of ordinary livestock, and that the products thereof, such as fresh meat and meat products, did not fall within the description 'agricultural commodities' as used in Section 303(b)(6). It stated that pelts, skins, or green and salted hides, are not agricultural commodities within the meaning of said section. The conclusion reached by the Commission is directly in point here.

"Where there is a definitely settled administrative construction for which there is a rational basis, the courts may adopt the same, especially where there is an absence of authority to the contrary." (Citations omitted)

The Interstate Commerce Commission, during the entire course of its administration of Part II of the Interstate Commerce Act, has held that dressed poultry is not an exempt agricultural commodity. In *Frank*

Battaglia Common Carrier Application, 18 M.C.C. 167 (May 1939), the Commission adopted the findings and conclusions recommended by a joint board which denied the grant of the application because of applicant's failure to prove need for the proposed operation, but concluded that butter, cheese, and dressed poultry were manufactured commodities for which authority was required. Subsequent to the *Battaglia Case*, the Commission, in *Monarch Egg Corporation Contract Carrier Application*, 26 M.C.C. 615 (November 1940), held that the transportation of dressed poultry was subject to the certificate requirements of Part II of the Act. The Commission reached similar conclusions in *Ollin W. Allen Common Carrier Application*, 28 M.C.C. 26 (February 1941) and *R. C. McCarthy Contract Carrier Application*, 32 M.C.C. 615 (March 1942).

The *Monarch Egg Case*, *supra*, was reopened by the Commission at the request of the Department of Agriculture and after further hearing the Commission sustained its prior conclusions and again held that dressed poultry could not be considered an unmanufactured agricultural commodity. *Monarch Egg Corp. Contract Carrier Application*, 44 M.C.C. 15 (October 1944). In support of its conclusions the Commission stated at page 19:

> We found in the prior report that the term "ordinary livestock" embraced poultry as well as cattle, horses, sheep, etc., but that dressed poultry, picked but not drawn, "does not come within the term livestock." In view of the definition of ordinary livestock set forth in Section 20 (11), which the legislative history above-discussed indicates should be applied also to the term as used in Section 203 (b)(6), it is apparent that poultry in any condition is not "ordinary livestock". However, they are raised on the farm, and clearly are in-

cluded within the broader description "agricultural commodities." It therefore becomes necessary to determine whether poultry which have been killed and picked but not drawn are unmanufactured agricultural commodities within the meaning of the present exemption.

As in the case of shelled pecans and walnuts, there is a complete absence of any showing of the customs and practices obtaining in the marketing of poultry, but certain facts in this connection are so well known that we may take cognizance of them for the purpose of the present determination. It is *common knowledge that, generally, farmers do not kill and pick poultry in marketing it.* Probably without exception, or at most with rare exceptions, the *commercial killing and dressing of poultry is done by meat-packing companies or by special poultry packers. Its subsequent transportation is under refrigeration. As such, it can no longer be considered an unmanufactured agricultural commodity.* (Emphasis added)

The next reported decision by the Commission was issued in *Determination of Exempt Agricultural Commodities, supra*, where it was held by the Commission, at page 557, as follows:

". . . we find that the term 'agricultural commodities (not including manufactured products thereof)' as used in Section 203 (b) (6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits and nuts); forest products; *live poultry* and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment have been so changed as to possess new forms, qualities, or properties, or result in combinations.

"We find that the term 'agricultural commodities (not including manufactured products thereof)' as used in Section 203 (b) (6) includes . . . (9) *live poultry*, namely, chickens, turkeys, ducks, gees, and guineas; . . ." (Emphasis added)

The foregoing cases represent all of those in which the Interstate Commerce Commission, in reported decisions, gave specific consideration to dressed poultry. However, the Commission's interpretation and application of the provisions of Section 203(b)(6) was continuous and consistent in a countless number of motor carrier application proceedings not reported in the permanent bound volumes of the Commission. Operating authorities involving the transportation of dressed poultry were obtained by a vast number of motor carriers pursuant to applications filed with and heard by the Interstate Commerce Commission and supported by evidence submitted on behalf of all of the most important meat packers of the country as well as many of the most important commercial poultry processors. There is nothing revealed in unreported cases of the Commission which would indicate that any of the shipper interests or any carrier applicant ever contended prior to or since the *Determination Case* that dressed poultry should be classified as a so-called exempt commodity. The contention that dressed poultry was within the purview of the exemption was not advanced with any vigor until the year 1948, at which time the Secretary of Agriculture alone urged the Commission to reverse its long-standing position with respect to dressed poultry and classify it as exempt. At this point it is appropriate to point out that no individual commercial poultry processor intervened in the *Determination Case* for the purpose of urging the acceptance of the views of the Secretary of Agri-

culture with respect to the classification of dressed poultry.

As seen, the Commission decisions involving dressed poultry represent a uniform interpretation of long standing which has been accepted both by the shipping public and motor carriers. The interpretation is one following extended consideration and meets every test of reason and more important achieves a result consistent with the congressional purpose.

The Commission's consistent, uniform and long-standing construction of the statutory terms in question as applied to processed poultry had formerly been accepted by the Department of Justice and for a number of years the Attorney General, through his local District Attorneys, had subjected to criminal prosecution carriers for engaging in the transportation of fresh and frozen poultry without appropriate operating authority from the Commission. As recently as March 15, 1953, the United States District Court for the Northern District of Iowa, in *U.S.* v. *S.S.D. Trucking Corp. and Samuel Ginsberg*, (not reported) imposed fines of $1,400 on each defendant for having transported dressed beef without authority, and on March 31, 1953, the U. S. District Court for the Northern District of Illinois imposed a fine of $1,000 on the uncertificated carrier for having engaged in the transportation of dressed poultry. Earlier, on March 19, 1948, the United States District Court for the District of Delaware, in *U.S.* v. *Reed Trucking Co. Inc.*, (not reported) the defendant was fined $250 for transporting dressed poultry without authority. The same court, on October 4, 1950, imposed fines on Reed Trucking Co., Inc. and H. & H. Poultry Company totalling $16,300 because the shipper had been granted rate con-

cessions on dressed poultry traffic. Had the traffic been exempt, as now contended, published rates would not been required to be charged and the prosecutions could not have been instituted.

After having enforced the Commission's interpretation of the statute involved as indicated above, the Department of Justice refused in the lower court to defend the order of the Commission in every respect consistent with its own earlier application of the statute which, indeed, was accepted by the courts imposing the fines.

POINT IV

THE INDUSTRIAL PROCESSES AND METHODS UTILIZED AND PRACTICES AND CUSTOMS FOLLOWED BY THE MEAT PACKING INDUSTRY AND POULTRY PROCESSING INDUSTRY SINCE 1935 IN THE GROWING, PROCESSING, MARKETING, AND DISTRIBUTION OF FRESH AND FROZEN MEAT AND FRESH AND FROZEN POULTRY CLEARLY DEMONSTRATE THAT SUCH PRODUCTS ARE "MANUFACTURED" AS THAT TERM IS USED IN SECTION 203 (b) (6) OF PART II OF THE INTERSTATE COMMERCE ACT.

(a) Beef, Veal, and Lamb Processing and Packing Constitute Manufacture

The publication entitled "Beef, Veal, and Lamb Operations," 4th Revised Edition, prepared and edited by the Committee on Recording of the American Meat Institute (1952) referred to in paragraph 31 of the stipulation of facts (RB 81) and incorporated by reference in the record made before the Commission, demonstrates in great detail that the business of slaughtering, processing, and preparing for market the products of slaughter is not only a highly specialized operation requiring skilled labor, but is an industry wholly dependent for successful operation on the use of technically complex and expensive machines and mechanical aids and devices. The degree of spe-

cialization present and the complexity of the operations, facilities, and equipment used in the meat packing industry is also evidenced by the regulations governing meat inspection of the United States Department of Agriculture, a copy of which was put in evidence in the proceeding below as Exhibit No. 27. The most casual perusal of those regulations convincingly demonstrates that the requirements contained therein are those applicable to processes of manufacture. The textbook above referred to, as well as the materials contained in Exhibit 21 (RB 147), present abundant evidence showing that the change brought about by and following slaughter of animals constitutes a change of essence and the resultant products, including fresh meat and frozen meat, are substances with a markedly different *form*, *quality*, and *properties*, and suitable only for purposes other than those possible while the animal remained in the live state. To state it briefly, the *essential* change occurs in the production of *animal meat* from a *meat animal*. The process is clearly one of manufacture under the definition of that term in *Fruit Growers, Inc.* v. *Brogdex Co.*, 283 U.S. 1, and the resultant products cannot reasonably be included within the term "agricultural commodity" as defined by the Commission or by Congress in the Renegotiation Acts, supra. That the change occurring in slaughter and processing of animal carcasses in meat packing houses constitutes a change in essence is so apparent that, like axiomatic propositions, it is difficult to offer extended proof in support thereof. Perhaps the most effective illustration of the point to be made is that the meat animal in the live state possesses all the powers, properties, and qualities of life, including an ability to propagate—the animal meat, on the other hand, as a product of

slaughter, has none of the essential properties of a living thing and has as its sole purpose and usefulness—edibility. In this connection it is here appropriate to quote the language of the United States Emergency Court of Appeals in *Superior Packing Company* v. *Clark*, 164 Fed. 2d, 343, where it was determined, among other things, under the Emergency Price Control Act, 50 U. S. C. A. Appendix Section 924(e) and regulations issued pursuant thereto that products of slaughter were not agricultural commodities as that term was used in the statute. On that point the court stated: (page 349)

> "A live steer is an 'agricultural commodity,' produced on a farm and sold by a farmer in its raw, natural or unprocessed state. A beef carcass, a wholesale cut, retail cuts such as steaks, or roasts, beef brains, kidneys, hearts, livers, or other edible by-products, as well as meat products resulting from still further processing, such as sausages—these are all distinct commodities not produced on the farm and sold by farmers. They are not 'agricultural commodities,' but commodities 'processed or manufactured in whole or substantial part' from the agricultural commodity, the live steer. The slaughterer's operation of producing these various meat products would be described as a processing operation in the everyday use of words, and it certainly is such from *the point of view of the steer*." (Emphasis added.)

In support of its conclusion, the court referred to portions of the legislative history of the statute in question and quoted certain language of Senator Bankhead, which we believe accurately reflects the general scope and limits of protection to which the Congress considers the farmer or *agricultural community* entitled: (page 349)

"In explaining his willingness to make this change, Senator Bankhead said that of course 'we had no desire to have the amendment cover anything but products dealt with by the Department of Agriculture and in the production and price of which the farmer, the agricultural producer, has a direct, immediate, primary interest.' (88 Cong. Rec. 160) The course of the debate makes clear that it was the intention not to require prior approval by the Secretary of Agriculture in the case of regulations relating to commodities processed or manufactured from agricultural commodities. See 88 Cong. Rec. 160, 172, 173, 180, 186. See also *Bowles* v. *American Brewery, Inc.*, 4 Cir., 1945, 146 F. 2d 842, 844."

(b) Poultry Processing and Packing Constitute Manufacture

Appellants contend that since it has been held that products of slaughter such as fresh and frozen beef, veal, lamb and pork are subject to the certificate, permit and general economic regulatory provisions of Part II of the Act, it must also be concluded that products of poultry slaughter including fresh and frozen cut-up or eviscerated chickens and turkeys are subject to the same provisions. It should be noted in this connection that although the Commission sustained that contention both in the *Determination* case and in this proceeding below, its conclusions with respect to products of slaughter rest on grounds different from those concerning poultry products. In *East Texas, et al.*, v. *Frozen Food Express*, the Commission stated: (RB 40)

"Although, as will be seen, we conclude that neither type of commodity is within the exemption provided by the statute, the reasoning in support of such conclusion differs as to the two classes of commodities. Obviously the exemption, if any, of

vehicles used in the transportation of dressed poultry depends upon whether that commodity is an 'agricultural commodity' or a 'manufactured product thereof.' In the case, however, of dressed livestock or those packing-house products derived from the slaughter of livestock, that issue is not, in our opinion, controlling."

Continuing, it was stated: (sheets 4 and 5)

"Thus, from the beginning of motor carrier regulation by us an exemption has been provided in section 203(b)(6) of vehicles used in the carrying of 'livestock' or 'ordinary livestock,' and also in the same section an exemption of vehicles used in the carrying of 'agricultural commodities.' The latter exemption does not duplicate the former nor did it establish a second exemption of vehicles used in carrying ordinary livestock. On the other hand, it must be concluded that the exemption of vehicles used in carrying ordinary livestock ends upon the slaughter of the livestock when it loses its identity as livestock, and that there was no intent in the same section to provide a further or second exemption of vehicles carrying the packing house products which result from the slaughter, on the theory that such commodities are 'agricultural commodities.' A Congressional intent, had there been one to exempt the transportation not only of ordinary livestock but also of the products of the slaughter thereof, would unquestionably have been so simple to state that the failure to do so negatives any such strained construction of the language actually used to accomplish that end. This conclusion conforms to that made by us in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, hereinafter referred to as the *Exemption* case."

Notwithstanding the fact that the Commission placed primary reliance for its conclusion with respect

to products of slaughter on the reasoning set forth above, it also concluded, quite properly, we think, that the exemption would not extend to fresh or frozen meat, for the reason that they are, *in fact*, manufactured.

With respect to poultry products, the Commission, in both the *Determination* case and in the proceeding below, concluded that fresh and frozen poultry were, *in fact*, manufactured agricultural commodities. Without regard to the differing rationale in support of the conclusions, the ultimate result achieved clearly reflects a consistency necessary to sound, intelligent, and effective regulation. In support of that proposition, it need only be recognized that both fresh and frozen meat and fresh and frozen poultry (a) compete in the market place with each other (as well as with other meat and poultry products conceded to be subject to regulation) for the same dollar of the housewife; (b) are processed and marketed in many instances in identical manner by meat packers that are engaged in the manufacture and distribution of other meat and poultry products that are admittedly manufactured and subject to regulation; (c) are oftentimes shipped or stored together or with other manufactured food products in the same vehicles or storage places, and when transported in the same vehicle with other manufactured food products are clearly subject to all regulatory provisions of the Act.

In the light of the foregoing facts, to conclude that products of slaughter are subject to all regulatory provisions of the Act and to conclude to the contrary with respect to poultry would impute to Congress not only an intent to discriminate without reason between competitive food products in exactly the same state, hav-

ing undergone almost identical processes of manufacture, as hereinafter shown, but in addition, would impose insurmountable practical difficulties on the agency charged with the duty of administering the Act.

The facts set forth in the stipulation with respect to preparing dead poultry for market (RB 82-86) establish that the poultry processing industry like meat packing is an important, highly-specialized business carried on in the main by large commercial operators and it is a business requiring for its successful operation technically complex apparatus and mechanical aids and devices. Poultry processing plants are in many ways similar in layout and basic construction to meat packing plants. That is to say that the various processes required are performed pursuant to a fixed pattern of operation usually with the same personnel performing the same functions on each bird. The detail of processing poultry for market is set forth in the Record. (RB 84)

In *I. C. C. v. Weldon*, 90 F. Supp. 873, affirmed, 180 Fed. (2d) 367, cert. denied, 342 U.S. 827, the fact that raw, unshelled peanuts required the use of elaborate machinery to remove the shells led the District Court to conclude that the shell removal process constituted a process of manufacture and hence shelled peanuts were found to be manufactured products under the provisions of Section 203-(b) (6). Appellants contend that the machinery, equipment, utensils and plants used in the processing of poultry, being even more complex than that used in peanut processing, would certainly support the conclusion that poultry processing constitutes manufacturing under the *Weldon* decision.

POINT V

THE COMMISSION'S ACTION IN THE PROCEEDING BELOW IS BASED ON AN INTERPRETATION OF THE EXEMPTIVE LANGUAGE COMPLETELY CONSISTENT WITH (A) THE NATIONAL TRANSPORTATION POLICY, THE GENERAL PURPOSES OF PART II OF THE INTERSTATE COMMERCE ACT, AND (B) IS SUPPORTED BY ADEQUATE FINDINGS WHICH IN TURN ARE BASED ON SUBSTANTIAL EVIDENCE.

(a) National Transportation Policy

This Court has recognized that the specific sections of all parts of the Interstate Commerce Act must be considered and interpreted in the light of the National Transportation Policy and the purpose of the act as a whole and with a constant realization of the evils sought to be corrected by the legislation. Even where the Commission had but clouded or doubtful specific power to act as it did, the court has upheld orders of the Commission by pointing to the general powers and broad authority contained in the National Transportation Policy. *American Trucking Associations* v. *U. S.*, 344 U. S. 298, *U. S.* v. *Pennsylvania Railroad Company*, 323 U. S. 612. In the last case cited it was said:

> "The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action and in the light of the Congressional purpose to foster an efficient and fair national transportation system."

In the earlier case this Court acknowledged the practical difficulties facing the legislature when enacting regulatory statutes and indicated why it is that such legislation sometimes fails to include precise grants of power and stated:

> "Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created for it is the fond hope of their authors that they bring to their work the experts' familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess." 344 U.S 310

In that case the court went on to sustain the validity of regulations issued by the Commission governing the lease and interchange of vehicles by motor carriers, and, in doing so, rejected the Department of Agriculture's contention that the regulations would restrict the scope of the exemptions of the section here in question. The court further recognized that the purpose of the rules was to protect the industry from practices detrimental to the maintenance of sound transportation services and that the rules were aimed at conditions sought to be corrected by Congress in subjecting the industry to regulation. Although the action taken by the Commission in the *Leasing* case was somewhat different in nature than that taken in the *Determination* case and in the proceeding below, the result sought to be achieved is identical; *i.e.*, to avoid return of the chaotic conditions which led to the enactment of Part II of the Interstate Commerce Act.

In *U. S.* v. *American Trucking Association, Inc.*, 310 U.S. 534, a case in which this Court was called upon to construe other undefined words of the same Act, Justice Reed, in reciting the controlling principles of statutory interpretation, stated: (page 543)

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legis-

lation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this court has followed that purpose rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." (Citations omitted.)

Continuing at page 544 he said:

> Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, "excepting as a different purpose is plainly shown." *United States* v. *Jefferson Electric Mfg. Co.*, 291 U.S. 386, 396.

Earlier, in the same opinion, the court had given recognition to the Congressional purpose in enacting the regulatory scheme governing motor transportation when it stated: (Page 538)

> The difficulty and wide scope of the problems raised by the growth of the motor carrier industry were obvious. Congress sought to set out its purpose and range of its action in a declaration of policy which covered the preservation and fostering of motor transportation in the public interest, tariffs, the coordination of transportation and cooperation with the several states in their efforts to systematize the industry.

(b) Adequate Findings and Substantial Evidence

It is, of course, recognized that to be valid, orders of an administrative body must be supported by evidentiary findings, ultimate fact findings and, in turn, by substantial evidence on the record considered as a whole. Administrative Procedure Act, Title 5 U.S.C. 1001 *et seq.*, *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474. Appellants contend that the order of the Commission bears no such infirmity for it was entered upon a carefully prepared statement of all essential findings which in turn were based on documentary evidence and stipulated facts drawn therefrom. It seems sufficient to state that the record and findings of the Commission adequately justify the conclusions and order entered thereon. Most important in connection with this point is that the attack made on the Commission's order did not allege either an insufficiency of evidence or inadequacy of fact finding.

POINT VI

THE KROBLIN CASE REFLECTS AN INCORRECT APPLICATION OF THE PROVISIONS OF SECTION 203 (b) (6) OF THE ACT.

The current controversy regarding the proper construction of the exemptive language of the Act had its genesis in the decision of the United States District Court for the Northern District of Iowa in *I.C.C.* v. *Kroblin*, 133 F. Supp. 599. In that case, the Commission filed a complaint against Allen E. Kroblin, Inc. alleging that the defendant was unlawfully engaged in the transportation of New York dressed and eviscerated poultry in interstate commerce. The relief sought by the Commission was to restrain the defendant from the further performance of the operations complained of until such time as it had acquired appropriate authority from the Interstate Commerce

Commission. The District Court refused to grant the injunction on the grounds that the commodities transported by the defendant were unmanufactured agricultural commodities, and, on appeal, was sustained by the United States Circuit Court of Appeals, 212 F. 2d 555. This Court denied certiorari on October 14, 1954. *I. C. C.* v. *Kroblin*, 348 U. S. 836.

The District Court's action in this proceeding was grounded primarily on the *Kroblin* case and appellees place reliance thereon in support of their contentions here.

Appellants urges this Court to reject the interpretation placed on the statutory terms in *Kroblin* not only because the District and Circuit Courts ignored past administrative and judicial interpretation of the section and the essential purposes of the Act as a whole, but in addition, because the District Court in that case improperly considered testimony developed in connection with subsequent proposed amendments to section 203(b)(6) in attempting to determine the intent of an earlier Congress which originally framed the language of the exemption.

As stated in the Court's opinion at page 630, its real basis for decision is as follows:

> "There are two features that stand out most predominantly in the voluminous legislative history relating to amendments made or proposed to Section 203(b)(6). One feature is that every amendment that Congress has made to it has broadened and liberalized its provisions in favor of exemption and the other feature is that although often importuned to do so, Congress has uniformly and steadfastly refused or rejected amendments which would either directly or indirectly

have denied the benefits of the exemptions contained therein to truckers who are engaged in operations similar to that of the defendant herein. It is believed that the actions and attitude of Congress as manifested in connection with amendments to Section 203(b)(6) are preponderantly indicative of an intent on the part of Congress that the words 'manufactured products' used in that subparagraph are not to be given the restricted meaning contended for by the Interstate Commerce Commission herein."

The Court's opinion also set forth an extended discussion of the legislative history of Section 203(b)(6) together with a thorough review of a number of Commission and court decisions involving the interpretation of the statutory terms of the language of Section 203(b)(6). An analysis of the opinion indicates quite clearly, however, that a number of the cases discussed by the Court including *I. C. C.* v. *Service*, 186 F. 2d 400; *I. C. C.* v. *Dunn*, 166 F. 2d 116 and *I. C. C.* v. *Love*, 77 F. Supp. 63 have no direct bearing on the issue there involved for the reason that they were concerned with interpretation of language of the section other than "agricultural commodities (not including manufactured products thereof)". But, as seen from the Court's statement above quoted, the decision is not based on the legislative history of the provision of the law required to be interpreted; nor—on administrative or judicial precedents—instead it appears that the District Court based its decision on incorrect inferences drawn from the testimony of *witnesses* appearing before Congressional committees in connection with later legislation. It should be noted that the Court incorrectly refers to the *transcript of testimony* taken in the Senate hearings under Senate Resolution 50 as Senate Committee Reports. The only *report* is-

sued in connection with the Senate Resolution 50 was Senate Report 1039, 82d Congress, First Session. An excerpt from that report, pages 13-15, dealing with the agricultural commodities exemption is attached to this brief as Appendix C.

Although we believe the District Court improperly considered testimony relating to subsequent proposed legislation as an extrinsic aid to construction of the statute before it, we agree that in some instances Congressional action or inaction on proposed legislation may indicate satisfaction or dissatisfaction with past administrative construction of the existing statute. Applying that thought here, it is submitted that the failure of Congress to amend Section 203 (b)(6) so as to specifically include poultry, dead (dressed or undressed) within the terms of the exemption constitutes implied endorsement by the Congress of the Commission's action on that commodity in the *Determination* case and in earlier decisions holding dressed poultry to be non exempt.

During the hearings under Senate Resolution 50, the Senate was made aware by the testimony of Commissioner Walter M. W. Splawn, among others[1] that the Commission in the *Determination* case and other proceedings had declared poultry (other than live) not to be an exempt commodity. The fact having been brought to the attention of the Senate Committee dealing with transportation legislation certainly is clear evidence of the fact that Congress not only had knowledge of the Commission's holding but it placed its approval thereon, for if Congress had disagreed with the Commission's decision with respect to poultry

[1] Domestic Land and Water Transportation, Transcript of Hearings before the Committee on Interstate and Foreign Commerce; United States Senate March 3-April 9, 1953 page 421-2.

(other than live) it could have provided for clarification in the legislation in which it made horticultural products subject to the exemption. (1952 amendment). "The reenactment of the statute by Congress, as well as the failure to amend it in the face of the consistent administrative construction, is at least persuasive of a legislative recognition and approval of the statute as construed." *National Lead Co. v. United States*, 252 U. S. 140, 146, and *McCaughn, Collector of Internal Revenue v. Hershey Chocolate Co.*, 51 S. Ct. 510.

CONCLUSION

Nos. 158, 159, 160 & 161

Appellants respectfully pray this Court to hold that the Commissions' decision in the *Determination* Case is subject to judicial review, and accordingly to reverse the decision of the Court below and remand the case with appropriate instructions for further proceedings.

Nos. 162, 163 & 164

Appellants respectfully pray this Honorable Court to reverse the decision of the Court below insofar as it held that fresh and frozen dressed poultry are exempt agricultural commodities within the purview of §203(b)(6) of the Interstate Commerce Act.

Respectfully submitted,

DAVID G. MACDONALD
FRANCIS W. MCINERNY
PETER T. BEARDSLEY
FRITZ R. KAHN
CLARENCE D. TODD
DALE C. DILLON
Attorneys for Appellants

Of Counsel:
MACFEAT, LYNCH and MACDONALD
TODD & DILLON
CALLAWAY, REED, KIDWELL and BROOKS
REEDER, GISLER and GRIFFIN

Certificate of Service

I, Francis W. McInerny, one of the attorneys for the several Appellants on whose behalf the foregoing brief is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding as indicated below.

This, the 11th day of January, 1956.

FRANCIS W. MCINERNY

Copies served in duly addressed envelopes with first-class postage prepaid:

Honorable Simon E. Sobeloff
Solicitor General
U. S. Department of Justice
Washington 25, D. C.

Leo H. Bou, Esquire
Office of the General Counsel
Interstate Commerce Commission
Washington 25, D. C.

Honorable Stanley N. Barnes
Assistant Attorney General
Daniel Friedman, Esquire
Special Assistant to the Attorney General
U. S. Department of Justice
Washington 25, D. C.

Robert L. Farrington, Esquire
Neal Brooks, Esquire
Donald A. Campbell, Esquire
Attorneys for the Secretary of Agriculture
Washington 25, D. C.

Charles P. Reynolds, Esquire
Shoreham Building
Washington 5, D. C.

Carl Helmetag, Esquire
Pennsylvania Railroad Company
1740 Suburban Station Building
Philadelphia, Pennsylvania

Copies served in duly addressed envelopes with air-mail postage prepaid:

Malcolm R. Wilkey, Esquire
United States Attorney
Houston, Texas

Carl L. Phinney, Esquire
Phinney and Hallman
617 First National Bank Building
Dallas, Texas

James W. Nisbet, Esquire
Association of Western Railways
280 Union Station Building
Chicago 6, Illinois

APPENDIX A

STATUTES INVOLVED

NATIONAL TRANSPORTATION POLICY [49 U.S. Code preceding §§ 7, 301, 901 and 1001] reads as follows:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

The material parts of the Interstate Commerce Act are:

SECTION 203 (b) (6) [49 U.S. Code 303 (b) (6)]

Nothing in this part, except the provisions of Section 204 relative to qualifications, and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation * * *.

SECTION 205 (g) [49 U.S. Code 305 (g)]

(g) Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I: *Provided*, That, where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of title 28 of the United States Code, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

SECTION 206 (a) [49 U.S. Code § 306 (a)]

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

(a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission

as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(2) Unless otherwise specifically indicated in such certificate, the holder of any certificate heretofore issued under this part, or hereafter issued under this part pursuant to an application filed on or before the date on which this paragraph takes effect, authorizing the holder thereof to engage as a common carrier by motor vehicle in the transportation in interstate or foreign commerce of passengers or property over any route or routes or within any territory, may without making application under this section engage, to the same extent and subject to the same terms, conditions, and limitations, as a common carrier by motor vehicle in the transportation of passengers or property, as the case may be, over such route or routes or within such territory, in commerce between places in the United States and places in Territories or possessions of the United States.

(3) Subject to the provisions of section 210, if any person (or its predecessor in interest) was in bona fide operation on March 1, 1950, over any route or routes or

within any territory, as a common carrier engaged in the transportation of passengers or property by motor vehicle in commerce between any place in the United States and any place in a Territory or possession of the United States, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on March 1, 1950, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Commission shall issue a certificate authorizing such operations without requiring further proof that public convenience and necessity will be served thereby, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after the date on which this subparagraph takes effect. Pending the determination of any such application, the continuance of such operation without a certificate shall be lawful. Any carrier which, on the date this subparagraph takes effect, is engaged in an operation of the character specified in the foregoing provisions of this subparagraph, but was not engaged in such operation on March 1, 1950, may under such regulations as the Commission shall prescribe, if application for a certificate is made to the Commission within one hundred and twenty days after the date on which this subparagraph takes effect, continue such operation without a certificate pending the determination of such application in accordance with section 207 (a).

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the

Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

SECTION 209 (a) [49 U.S. Code 309 (a)]

(a) (1) Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise, the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such opera-

tion for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further*, That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

(2) Unless otherwise specifically indicated in such permit, the holder of any permit heretofore issued under this part, or hereafter issued under this part pursuant to an application filed on or before the date on which this paragraph takes effect, authorizing the holder thereof to engage as a contract carrier by motor vehicle in the transportation in interstate or foreign commerce of passengers or property over any route or routes or within any territory, may without making application under this part engage, to the same extent and subject to the same terms, conditions, and limitations, as a contract carrier by motor vehicle in the transportation of passengers or property, as the case may be, over such route or routes or within such territory, in commerce between places in the United States and places in Territories or possessions of the United States.

(3) Subject to the provisions of section 210, if any person (or its predecessor in interest) was in bona fide operation on March 1, 1950, over any route or routes or within any territory, as a contract carrier engaged in the transportation of passengers or property by motor vehicle in commerce between any place in the United States and any place in a Territory or possession of the United States, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on March 1, 1950, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor

in interest had no control, the Commission shall issue a permit authorizing such operations, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after the date on which this subparagraph takes effect. Pending the determination of any such application, the continuance of such operation without a permit shall be lawful. Any carrier which, on the date this subparagraph takes effect, is engaged in an operation of the character specified in the foregoing provisions of this subparagraph, but was not engaged in such operation on March 1, 1950, may under such regulations as the Commission shall prescribe, if application for a permit is made to the Commission within one hundred and twenty days after the date on which this subparagraph takes effect, continue such operation without a permit pending the determination of such application in accordance with subsection (b) of this section.

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect

to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.

SECTION 222(b) [49 U.S. Code 322 (b)]

(b) If any motor carrier or broker operates in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this part, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this part or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto.

The material parts of the ADMINISTRATIVE PROCEDURE ACT are:

SECTION 10 [5 U.S. Code 1009]

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory

review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably de-

stance, hauling for his neighbor, or possibly some time reciprocal hauling, and it was our thought, rather, that it should extend so as to include the from the farm to the market haul.

The bill was reported out of Committee, 79 Cong. Rec. 11813, and in the House Committee report to accompany S. 1629, Report No. 1645, 74th Cong., 1st sess., an amendment to the exemption section was provided in the following language:

> (8) motor vehicles used exclusively in carrying livestock or unprocessed agricultural products;

When discussion of the bill was begun on the floor of the House of Representatives the two exemption provisions which related to agriculture were sub-section (6), relating to livestock and unprocessed agricultural commodities and sub-section (9), relating to casual or occasional transportation. The following colloquy relative to the former is reported at 79 Cong. Rec. 12205:

> Mr. Andresen. Does the gentleman consider cream unprocessed?
>
> Mr. Rayburn. I do.
>
> * * *
>
> Mr. Dingell. I think it is quite evident that canned milk is processed milk. Raw milk in cans, going to market, or separated cream, is not processed.
>
> By that same method you will determine that beef in cans is processed and beef on the hoof is not processed. I think the question is plain beyond doubt and that there is a definite distinction between processed corn in cans and corn coming to the market on the ear.
>
> * * *
>
> Mr. Andresen. This is a very important proposition the gentleman is on right now. It is clear, then, that it

includes all farm commodities produced upon any farm in the raw state ready for market.

Mr. Sadowski. On the whole, that is the way the Commission will interpret it. Undoubtedly, the courts will give the same interpretation to it. I do not think we need discuss this further.

The matter was discussed again in connection with the exemption of casual and occasional transportation. At 79 Cong. Rec. 12209, appears this exchange:

Mr. Gilchrist . . . the word "reciprocal" is used. I do not know exactly what that means.

Mr. Mapes. That means if you and I are neighbors owning adjoining farms, and you go to market and bring back something for me and I pay you for it, and then 6 months later I go to market and bring back something for you and you pay me for it, that is a reciprocal transaction and would not come under this legislation.

Further discussion of the exemptions to be provided farmers is found at 79 Cong. Rec. 12213:

Mr. Gillette. That being the case, what was the object in providing an exemption for carriers of livestock exclusively or farm products exclusively? Why not regulate that? What was the object of the exemption?

Mr. Holmes. The object was to help the farmer and keep him out of any regulation whatsoever insofar as handling unprocessed agricultural products or livestock on the farm. As an individual owner he would be exempt anyway and would not come under the provisions of the bill.

Mr. Gillette. If regulatory measures were necessary, as were sought to be obtained in this bill, would it not be advisable to apply them to that class of carriers? Why would you exempt a man who is engaged exclu-

sively in carrying livestock, and bring in a farmer who carries livestock on some trip and other materials on other trips?

Mr. Holmes. The farmer who carries livestock on one trip and unprocessed agricultural products on another trip may combine them both and carry livestock and farm products or machinery and be exempt under the provisions of the bill.

Mr. Gillette. Not if he carries other freight.

Mr. Holmes. The purpose of this exemption is that a man who may take a bag of beans or a bushel of potatoes or any other unprocessed agricultural commodity and put it on his truck cannot get exemption from regulation and then go into the general trucking business in competition with his neighbor who has a legitimate permit to operate as a contract carrier.

With this preliminary discussion as a background the amendments made from the floor of the House can be viewed in their proper perspective. The first was the addition of subsections (4)(a) and (4)(b). The discussion relating to this amendment appears at 79 Cong. Rec. 12218, and the motion for amendment at 79 Cong. Rec. 12221 and 12222, by Representative Jones of Texas:

Mr. Jones. Mr. Chairman, the reason I want to rise now is because of a discussion in connection with exemptions. I expect to offer an amendment at the end of the next session, and I would like to read them to the Committee.

Among the exemptions I expect to offer the following:

"Motor vehicles controlled and operated by any farmer and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farms; or motor vehicles controlled and operated by a cooperative

association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended."

That amendment would do two things. It would permit the farmer hauling his crop to market to haul his supplies back home. In the second place, it would exempt cooperative organizations to comply with the Capper-Volstead Act, which is the standard definition of cooperative recognized since 1922.

* * *

Now, I hope I may not be interrupted until I explain the reason for offering this cooperative amendment. This exemption is consistent with the purpose of the act to regulate the use of highways by persons and corporations who use them regularly as places of business and as the primary means of gaining a livelihood. Cooperative organizations do not act as moneymakers in transportation. The hauling is done as a means of reducing the marketing expenses of their members.

Especially in highly organized communities it is almost essential they do some hauling for non-members. Otherwise certain farmers who are only temporarily in the community and in some instances tenants might be left without transportation facilities. In some instances it reduces the expense of handling to combine some hauling for nonmembers. This does not mean going into the general business of transportation. It is merely incidental to the hauling for their own members. It is a practical proposition.

At 79 Cong. Rec. 12220 the amendment to sub-section (6) was discussed:

Mr. Pettengill. Mr. Chairman, we have heard a good deal of discussion this afternoon as to what is a processed agricultural product, whether that would include pasteurized milk or ginned cotton. It was not the intent

of the committee that it should include those products. Therefore, to meet the views of many Members we thought we would strike out the word "unprocessed" and make it apply only to manufactured products.

Mr. Whittington. In other words, under the amendment to the committee amendment, cotton in bales and cottonseed transported from the ginneries to the market or to a public warehouse would be exempt if the language remained, because ginning is sometimes synonymous with processing.

Mr. Pettengill. That is correct.

Mr. Truax. Will the gentleman's amendment be in conformity with the wishes of the cooperative milk producers association? They say that unprocessed agricultural products . . . are intended to cover milk and cream being transported from the farm to the country receiving stations or creamery.

Mr. Pettengill. We think it covers that.

Mr. Truax. Therefore, further amendment will not be necessary to strike raw milk from under that clause?

Mr. Pettengill. That is right.

Upon motion of Representative Bland of Virginia, "fish, including shell-fish" was inserted. 79 Cong. Rec. 12220.

The amendment proposed by Mr. Jones, which specifically covered farmers, was formally offered at 79 Cong. Rec. 12220. The contention was again unsuccessfully made that the matter was already covered by the casual exemption. The Jones amendment was adopted at 79 Cong. Rec. 12222 and is now Section 203(b)(4a) of the Act.

Shortly after this amendment, upon motion of Representative Pettengill, sub-paragraphs (6) and (7) were brought forward from the end of paragraph (b), thereby eliminating the discretionary power of the Commission to extend regulation to these categories. 79 Cong. Rec. 12226.

At 79 Cong. Rec. 12226, Mr. Gilchrist offered an amendment which would have substituted the word "primarily" in place of the word "exclusively" in the exemption dealing with agricultural commodities. This was rejected at 79 Cong. Rec. 12227. At 79 Cong. Rec. 12279, Mr. Michener made a statement about S. 1629 prior to the final vote on it: "The bill has been amended in numerous particulars. The farmer is especially cared for. And the bill on which we will vote today, in my judgment, fully protects farm trucking." The amended bill passed the House, 79 Cong. Rec. 12279, and then went to the Senate, 79 Cong. Rec. 12459, where the amendments were read and discussed. At 79 Cong. Rec. 12460, Senator Wheeler was asked to explain the amendments, whereupon he stated: "Mr. President, the House amended the bill in minor details, generally liberalizing the provisions of the measure with reference to trucks which are owned by farmers, and which carry farm products. The bill was also liberalized with reference to associations of cooperative farm organizations. It was liberalized in those respects. I personally have no objections to the amendments, and think the bill is improved." The amended bill was examined and signed in the Senate. 79 Cong. Rec. 12617. Signed by the Speaker of the House at 79 Cong. Rec. 12709, the bill was presented to the President, at 79 Cong. Rec. 12712, and approved and signed by the President on August 9, 1935. 79 Cong. Rec. 12863.

B. Subsequent attempts at amendment

The attempts that have been made, either successfully or unsuccessfully, to amend Section 203(b)(6) of the Interstate Commerce Act since the time of its enactment in 1935 shed little light on the meaning of the phrase "agricultural commodities (not including manufactured products thereof)". If anything, they show that certain interests, including the Interstate Commerce Commission, were disturbed lest the exemption of Section 203 (b)(6), being as broad as it was, and is, disrupt the general scheme of regu-

layed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

The material parts of the JUDICIAL CODE are:

SECTION 1336 [28 U.S. Code 1336]

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

SECTION 1398 [28 U.S. Code 1398]

Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

SECTION 2284 [28 U.S. Code 2284]

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one

member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days' notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be

reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

SECTION 2321 [28 U.S. Code 2321]

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

SECTION 2322 [28 U.S. Code 2322]

All actions specified in section 2321 of this title shall be brought by or against the United States.

SECTION 2323 [28 U.S. Code 2323]

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may

appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

SECTION 2324 [28 U.S. Code 2324]

The pendency of an action to enjoin, set aside, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

SECTION 2325 [28 U.S. Code 2325]

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

APPENDIX B

LEGISLATIVE HISTORY OF SECTION 203(b)(6) OF PART II OF THE INTERSTATE COMMERCE ACT.

A. The history of the original language of Section 203(b)(6).

Bills similar to the bill which ultimately was enacted as the Motor Carrier Act, 1935, had been introduced in the 69th Congress and each succeeding Congress up to 1935. The bill which became the Motor Carrier Act was drafted by the late Joseph B. Eastman, one of the country's notable public servants and an outstanding expert in the field of transportation. One of his duties while serving as Federal Coordinator of Transportation under the Emergency Railroad Transportation Act, 1933, 48 Stat. 211 *et seq.*, 49 U.S.C.A. § 250, *et seq.*, was, from time to time, to "submit to the Commission such recommendations calling for . . . [legislation] as he may deem necessary or desirable in the public interest", and those recommendations were to be transmitted to the President and to the Congress, with the comments of the Commission. Accordingly, the Coordinator's Second Report, Sen. Doc. No. 152, 73rd Cong., 2nd Sess., contained a proposed bill for the regulation of motor carriers. Section 303(b) of the Eastman Bill exempted from regulation:

> . . . unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 302, shall the provisions of this part apply to: . . . (7) the casual or occasional transportation of persons or property in interstate or foreign commerce for compensation by any persons not regularly engaged in transportation by motor vehicles as his or its principal occupation or business.

The Third Report of the Federal Coordinator of Transportation, House Document No. 89, 74th Cong., 1st Sess., submitted January 30, 1935, included a resubmission of the

Eastman Bill. The quoted category of exempt vehicles which appeared in the first Eastman bill was continued with minor changes. This bill was introduced as H. R. 5262 and S. 1629 in the 74th Congress, 1st Session.

Hearings in the Senate on S. 1629 were held by the Committee on Interstate Commerce from February 25 to March 6, 1935. Coordinator Eastman, the first witness, explained the purpose of the exemption of casual or occasional transportation, as follows, begining at page 86 of the printed record of the hearings:

> Mr. Eastman. There is a provision in the earlier part of the bill, paragraph (b) of section 303, providing for certain exemptions, and one of those is the casual or occasional transportation of persons or property in interstate and foreign commerce for compensation by any person not regularly engaged in transportation by motor vehicle as his or its principal occupation or business.
>
> Senator Hastings. He is exempt?
>
> Mr. Eastman. Yes; unless the Commission brings him in. It is given the power to do that if it appears to be necessary.
>
> Senator Hastings. I have in mind two farmers whose farms adjoin. One of them has a truck. He not only takes his own produce to market, maybe in a single load, but the next day he will take his neighbor's at so much for the load; or they may combine the two and make a single load. Do you think that is taken care of?
>
> Mr. Eastman. If it were casual or occasional transportation of that kind and he was not engaged in transportation by motor vehicle as his principal occupation, I think he would be exempted.

The bill was reported out of Committee, 79 Cong Rec. 5485, and Senate Report No. 482 accompanied it. The report was general in character and did not refer to the matter of

exemptions. The debate on the floor of the Senate is reported, beginning at 79 Cong. Rec. 5649.

Senator Burton K. Wheeler, Chairman of the Senate Committee on Interstate Commerce, explained the various provisions of the bill. Speaking of the exemption of Section 203(b)(7), as amended by the Committee, he said, at 79 Cong. Rec. 5651:

> The second conditional exemption provided in the original bill applied to the "casual or occasional transportation of passengers or property in interstate or foreign commerce for compensation by any person not regularly engaged in transportation by motor vehicle as his or its principal occupation or business." This provision was intended to exempt the operations of farmers and others who occasionally haul for-hire, but who do not enter in any important way into for-hire transportation. The addition of the word "reciprocal" and the other change made in this paragraph broadened the exemption in line with suggestions made at the hearings.
>
> Some of the shippers who came before us and some of the smaller individuals thought that the language should be broadened; and in order to cover that we used the word "reciprocal," which they had suggested.

The amendment was agreed to, 79 Cong. Rec. 5660, and the bill was passed by the Senate with this exemption but without a specific exemption covering farmers or farm commodities. 79 Cong. Rec. 5737.

Hearings in the House on H. R. 5262 and H. R. 6016, an alternate bill, were held by the Committee on Interstate and Foreign Commerce from February 19 through March 5, 1935. The first explanation of the relationship of the proposed exemptions to agriculture appears on pages 46 and 47 of the printed report of the hearings. Congressman Wadsworth directed Mr. Eastman's attention to the seventh

category of exemption, dealing with casual or occasional transportation, and asked its purposes, suggesting that it would exempt thousands and thousands of trucks:

Mr. Eastman. Yes, I do not say it is intended to exempt "thousands and thousands." It was really intended to cover the situation of the farmer more than anything else. The farmers operate their own trucks in many instances, and may occasionally do some trucking for their neighbors.

Mr. Wadsworth. I myself engage in farming, and I take it that this would cover it. But my thought was that it will be found there are thousands of trucks carrying cattle to the Chicago stockyards, or to Buffalo or Omaha and many other livestock markets. Many of the farmers own their own trucks and move their livestock to market in that way, or the farmer may hire his neighbor's truck to haul a few cattle for him to market once or twice a week. I do not know whether that is a casual case, but there are large numbers of them. You also have the case of a very large quantity of milk moving in that manner.

Mr. Eastman. Those two last exemptions, no. 6 and no. 7, provided by this legislation, are prefaced by the words which appear in lines 9 to 12:

> "Nor unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 302, shall the provisions of this part apply—"

and so forth.

Mr. Wadsworth. Yes.

Mr. Eastman. Now, if it were found by experience that there were being eliminated from regulation, through these exemptions, operations which ought, in the public interest, to be included, the Commission could provide for their inclusion.

Mr. Wadsworth. You think that takes care of it?

Mr. Eastman. Yes; I do.

Recapitulating, it is apparent that the seventh proviso [now Section 203(b)(9) of the Act] of the Eastman bill, exempting the "casual or occasional" transportation was designed to "cover the situation of the farmer", in Mr. Eastman's words, subject to the limitation that the Commission, for good cause shown, could remove from this exemption any portion of the transportation performed pursuant to it.

In the testimony of Earl N. Cannon, representing the Wisconsin Common Carriers' Association, appears the following exchange, at page 238:

Mr. Bulwinkle. Are there any amendments that you would offer to it?

Mr. Cannon. I might say—I believe there is one amendment.

Mr. Bulwinkle. All right; let us hear it.

Mr. Cannon. In Wisconsin we had one problem involving agriculture.

Mr. Bulwinkle: What would your amendment be?

Mr. Cannon. I would amend the bill to exempt the man handling farm and dairy products, exclusively, regardless of where or for whom he hauls such products and to what market.

Mr. Bulwinkle. And what would be your object in that, Mr. Cannon?

Mr. Cannon. I might say in Wisconsin, being a dairying State, we have this special problem coming before us. In fact, the original bill that went to the Supreme Court, I think in the act of 1931 which went to the Supreme Court—which sought to exempt them. The Supreme Court handed down an opinion and said that inasmuch as these trucks were engaged in handling a problem involving the dairy industry it could be exempt.

Now, the problem, Mr. Chairman, that I speak of in Wisconsin is the same kind of a problem that will arise all over the country; it is difficult to regulate; there are so many trucks in so many different communities handling agricultural products that it would be difficult to keep them going along the proper course. I think that you must draw a distinction there.

Mr. Huddleston. The purpose of that distinction being to help the farmers in disposing of their products.

Mr. Cannon. Yes. And then again the number of trucks and the kind of merchandise, type of merchandise, is large, and in the most cases the territory served is small, shipping to various creameries, and so forth.

Mr. Huddleston. Would you extend that to all agricultural products?

Mr. Cannon. To dairying and farm products; yes.

Mr. Huddleston. To fruits and vegetables?

Mr. Cannon. Yes.

Mr. Huddleston. And all other farm products?

Mr. Cannon. Fruits and vegetables; yes.

Mr. Bulwinkle. And cotton?

Mr. Cannon. I do not know about that industry, Mr. Bulwinkle, enough to discuss it.

At page 241, witness Mr. Harry A. Wheeler representing the "transportation conference," including a number of rail-carrier and water-carrier associations, the Grain and Feed Dealers National Association, the Institute of Meat Packers, and the National Association of Manufacturers, among others, summarized its position on the "farm-to-market haul" as a proposed exemption, stating that his conference had proposed "an exemption in the farm-to-market haul", but that it did not regard that of particular significance in view of the definitions that were being given. Wheeler stated:

Clearly the private operator is given a place and our honest thought in the matter was to protect those interests that may have some hauling, a man, for in-

lation of the Motor Carrier Act. It was early recognized that as it was then worded Section 203(b)(6) would exclude from virtually all regulation by the Commission trucks hauling farm products that had been processed at some plant removed from the farm, such as milk that had been pasteurized at a dairy or cotton that had been ginned at a ginnery. It was felt by some that such an exemption was too broad and that Section 203(b)(6) should be reworded to have it apply only to those vehicles first moving the products from the farm.

On May 27, 1939, the Legislative Committee of the Interstate Commerce Commission addressed a letter to Senator Wheeler in which it was proposed that Section 203(b)(6) be rewritten so as to restrict the scope of the provision. The letter explained that the provision now "applies to transportation of agricultural commodities for the commissionman, broker, and other distributors of farm products, both processed and unprocessed" and that such broad exemption in its judgment constituted an unwarranted discrimination. The proposed amendment of Section 203(b)(6) was as follows:

> Motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell-fish) or agricultural commodities (not including manufactured products thereof) from the point of production to the point of primary market, processing, manufacture, or transshipment, if such motor vehicles are not used in interstate or foreign commerce in carrying any other property or passengers for compensation.

This proposal not having been adopted, on January 29, 1940, the Legislative Committee of the Interstate Commerce Commission again proposed a change in the provisions of Section 203(b)(6). The later proposal was contained in a letter addressed to the Chairman of the House Committee on Interstate and Foreign Commerce and the Chairman of the Senate Committee on Interstate Commerce. The Com-

nittees had under consideration S. 2009 which proposed to end the exemption for the transportation of the commodities referred to in Section 203(b)(6) at the point where those commodities first entered the channels of commerce. The proposal of the Interstate Commerce Commission was rejected by the Committees. The portion of that letter of the Commission bearing on this phase was as follows:

> As the exemption in paragraph (h) is now worded, in many cases it does not affect transportation for the farmer but applies to transportation of agricultural commodities for the commission man, broker, and other distributors of farm products both processed and unprocessed, a discrimination in favor of one type of commodity which seems unwarranted. In some 21 State statutes this difficulty has been met by limiting the exemption to the transportation of agricultural commodities and livestock from the point of production to the primary market or like point. We suggest, therefore, that the paragraph be amended to read as follows: (h) The transportation of property consisting of ordinary livestock (including poultry, whole fresh fish (including shell-fish), or agricultural commodities (not including manufactured products thereof), in the first movement from the point of production to the point of sale by the producer, or to the point of manufacture or transshipment. The point of production for fish shall mean the wharf or other landing place at which the fisherman debarks his catch, and the point of production for livestock or agricultural products shall include the point at which they are gathered for initial shipment to the point of first sale, manufacture, or transshipment. The point of first sale shall not be deemed to include the point of production. *Omnibus Transportation Legislation*, House Committee Print, 76th Cong., 3rd Sess.

One change was made in Section 203(b)(6) by the Transportation Act of 1940, 54 Stat. 919 *et seq.*, and that was the

insertion of the word "ordinary" before the word "livestock". An explanation of this change was made by the Commission in the second *Monark* case, *supra*, at 44 M.C.C. 18, as follows:

> In its first report to the Senate on Senate bill 2009, which as thereafter changed became the Transportation Act of 1940, the Senate Committee on Interstate Commerce explained, "the word 'ordinary' before 'livestock' has been inserted for the purpose of harmonizing that definition with the definition contained in the Cummins amendment, * * * wherein ordinary livestock is defined." The Cummins amendment, section 20(11) of this act, provides that "The term 'ordinary livestock' shall include all cattle, swine, sheep, goats, horses, mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses."

The effect of this change, among other things, was to lead the Commission to change its interpretation of the status of poultry, which it had first classed as livestock (and therefore exempt only when alive) and which in the last-cited case it held to be an agricultural commodity (but manufactured when dressed).

In 1943, a bill, S. 1148, was introduced in the 78th Congress, 1st Session, by Senator Lodge. The bill would have amended Section 203(b)(6) to read as follows:

> Motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof), by the producers of such property or by private carriers of property by motor vehicle, if such vehicles are not used in carrying such property or any other property, or passengers, for compensation.

The bill never became law, but, if it had, its effect would have been to limit the exemption to the actual producer or to those hauling without compensation.

On July 9, 1952, Section 203(b)(4a) and (6) of the Motor rrier Act, were amended by the insertion of the words ncluding horticultural" after the word "agricultural" in ch of said sections. The bill, S. 2357, as originally introced, as well as several amendments in the nature of bstitutes, would have limited the scope of the exemption ovided by subparagraph (6) here involved. Originally troduced by Senator Johnson of Colorado, the bill would ve provided for Section 203(b)(4a) to read, as follows:

> Motor Vehicles controlled and operated by any farmer, (i) transporting supplies to his farm, or (ii) transporting ordinary livestock as defined in Section 20(11) of this Act, or agricultural commodities (not including livestock or commodities which have been processed to a greater extent than is customarily done by farmers) prior to their marketing by the farmers raising or producing such livestock or commodities, if such motor vehicles are not used at the same time or on the return trip or customarily in any other kind of transportation for compensation . . .

Section 203(b)(6) would have been amended to provide r the partial exemption of vehicles transporting fish only. veral amendments to the proposed legislation were ofred; however, each of them would have had the effect of bstanfially limiting the scope of the partial exemption of ction 203(b)(6) by eliminating almost completely any emption with respect to any transportation not perrmed by the farmer himself. Sen. Rep. No. 1615, 82nd ng., 2nd Sess., accompanying S. 2357, p. 2.

These attempts at amending the wording of Section 203)(6) following the passage of the Motor Carrier Act to nit the exemption to only those vehicles actually emoyed by the farmer in carrying his products to market in way alter the fact that the purpose of the exemption was aid the farmer.

APPENDIX C

AN EXCERPT FROM SENATE REPORT NO. 1039, 82ND CONGRESS, FIRST SESSION.

(Progress Report of the Senate Committee on Interstate and Foreign Commerce, by its Domestic Land and Water Transportation Subcommittee, pursuant to S. Res. 50, 81st Congress.)

B. THE AGRICULTURAL COMMODITIES EXEMPTION.

The Motor Carrier Act of 1935, now part II of the Interstate Commerce Act, specifically excluded from regulation, except in matters of safety generally, certain types of motor carriers and other carriers engaged in certain types of transportation. This general escape section exempts, among other carriers, "motor vehicles used in carrying property consisting of ordinary livestock, fish (including shellfish), or agricultural commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation." The legislative history of this so-called agricultural product exemption tends to show that the provision was written into the Motor Transportation Act for the limited purpose of exempting from general regulation the farm-to-market or wharf-to-market transportation by motor carrier for the farmer or for the fisherman. The clause was suggested as an amendment to the legislation by the House Interstate and Foreign Commerce Committee after lengthy consideration and in the following language:

> "motor vehicles used exclusively in carrying livestock or unprocessed agricultural products;"

On the floor of the House, the exemption was broadened to include fish and shellfish. The word "unprocessed" was stricken, and the parenthetical phrase "not including manufactured products thereof" was inserted as a modification

f the exemption of agricultural commodities, at least artly to assuage the fears of those legislators who ques- oned whether commodities such as pasteurized milk might e interpreted as processed under the law. The require- ent that motor vehicles, to be exempted under this clause, ad to be used exclusively for the carriage of livestock or gricultural commodities was eliminated in favor of the ondition: "if such motor vehicles are not used in carry- g any other property, or passengers, for compensation," change which must have seemed of little consequence at at time but which was made to avoid restricting the armers' use of hired vehicles to transport supplies to e farm. Finally, and again by amendment from the floor f the House, the operation of the exemption was made bsolute by moving it from under the conditional and iscretionary administration of the Interstate Commerce ommission, who, in the absence of this move, might have pplied such regulatory measures as it deemed necessary carry out the national transportation policy.

Subsequent administrative and judicial interpretations ave broadened further the scope of the agricultural prod- cts exemption. The prohibition in the law which denied xemption to vehicles carrying other property or passen- ers for hire has been stripped of much significance by he decision in *Interstate Commerce Commission* v. *Parker* . *Dunn*, which, in effect, wrote the words "at the same me" into the condition. Further, the admittedly loose anguage of the commodity descriptions has been stretched o cover a variety of products which hardly would have ome under the original adjective "unprocessed."

The net effect of these interpretations has been to apply he exemption not only to the carrier for the farmer and sherman—for whom it was intended—but also to dealers , and processors of, agricultural commodities and fish. urther, the broadness of the exemption has encouraged he rise of a vast armada of exempt truckers who success-

fully avoid all regulation by a combination of the hauling of exempt commodities with the practice of trip leasing.

The operations of exempt carriers by motor are not insignificant. There are approximately 40,000 truckers exempted by this clause on the highways today in comparison to 20,042 motor common carriers subject to regulation. Under the court-broadened exemption, many contract and private carriers are hauling exempt commodities as return loads, to avoid the costly misfortune of returning empty. The chief advantage of exemption from regulation, insofar as these motor carriers are concerned, is the ability to sell their services far below the established rates of common carriers by rail or motor. Further, on return runs even of nonexempt loads, the exempt carrier may, either by trip leasing or by absorbing the mark-down on the exempt run, haul at less than the published tariff.

The effect of these practices on competing common carriers by rail or motor is a serious loss of traffic. Railroads are forbidden to meet lower rates without posting proposed new rates 30 days in advance of the effective date; a requirement which obviously makes it an impossibility to match tariffs with an unregulated carrier. The situation is one which, if allowed to continue, will greatly unbalance the national transportation system. In order to preserve the system and to promote its development, it seems incumbent on Congress to insure that the regulation it has prescribed does not destroy the regulated carriers.

Witnesses appearing before the subcommittee for common carriers by rail and motor advocated restrictive modification or repeal of the exemption. Even at the time the act was being considered, there was informed support for the position that the agricultural product exemption was surplusage. The late Joseph B. Eastman, then Federal Coordinator of Transportation, believed that the exemption of farmer owned and operated motor carriers for transportation of farm produce or supplies, coupled with

he exemption of casual, occasional, or reciprocal trans-
portation, both included in his proposals would adequately
neet the situation. As might be expected, farm and co-
perative groups were vehement in their protests against
ny modification of the exemption. Farmers generally have
een, and understandably are, concerned over increased
ost of transportation to market, should regulation be
pplied to that transportation.

It is conceded that any modification of the exemption should safeguard the farm-to-market move. On the other hand, before the Dunn decision, for-hire motor carriers on the farm-to-market runs were regulated generally and that experience indicated no increase in motor rates to rail rate levels. In fact, rail rates on the average dropped to regulated motor-carrier rates. The fears of the farm groups in these respects seem to be largely groundless.

The subcommittee is convinced that the present situation with respect to exempt carriers is intolerable. The effect on the national transportation system, as a whole, is contrary to the best public interest. It is far from clear, however, that the agricultural products exemption could be entirely repealed without doing injury to the farmers and violence to the intent of Congress in enacting the exemption. There is a place in the agricultural transportation picture for an exempt motor carrier for hire who could neither qualify under the farmer-owned or casual and occasional exemptions. It is quite clear from the evidence, however, that the operations of such a carrier should be curtailed sharply, limited to carriage from farm or wharf to the primary market, and restricted from competition in the nonexempt commodity traffic market. Further, the nature of exempt commodities clearly needs careful redefinition. Finally, it seems advisable to reimpose the judgment of the Interstate Commerce Commission as to the extent of the exemption, setting as a standard interference with the effectuation by the Commission of the objective of the national transportation policy.